D. Options

§ 969.02(1)
§ 969.03(1)

1) Release Def without bail

§ 969.02(1)
§ 969.03(1)

2) Permit execution of unsecured appearance (personal recognizance) bond with conditions

§ 969.02(2)
§ 969.03(1)

3) Require execution of secured appearance bond with solvent sureties

§ 969.02(2)
§ 969.03(1)

4) Require execution of secured appearance bond with cash deposit

§ 969.02(6)
§ 969.03(4)
§ 969.13(5)

   a. If cash deposit in lieu of sureties required, person making cash deposit must be given written notice that, upon conviction, deposit will be applied to restitution and any fines, costs, or fees

St v Iglesias
185 Wis. 2d 117, 130–31
(1994)

   - However, money posted for bail, irrespective of its source, is conclusively presumed to be the Def's money

St v Gassen
143 Wis. 2d 761
(Ct. App. 1988)

   b. Ct not required to accept sufficient solvent sureties in lieu of cash

§ 969.02(8)

   c. In a misdemeanor case, must not exceed maximum fine for offense

E. Standards for Setting Bail (if not charged with Violent Crimes under § 969.001(3))

§ 969.01(1)(b)1.

1) Bail may be imposed upon specific finding that there is reasonable basis to believe bail necessary to ensure Def's appearance in Ct

§ 969.01(4)

   a. Shall be only in amount found necessary to do so

F. Standards for Setting Bail (if charged with Violent Crimes under § 969.001(3))

See Chart in Sec. 9, *infra*

§ 969.01(1)(b)2.

1) Bail may be imposed upon a finding that it is necessary based on the totality of the circumstances

2) Factors include, but are not limited to:

   a. Previous convictions for a violent crime

b. Probability that Def will fail to appear in Ct

c. Need to protect members of community from serious harm

d. Need to prevent intimidation of witnesses

e. Consideration of any potential affirmative defenses

§ 969.01(4) 3) Bail may not be excessive

G. Other Considerations in Setting Bond/Bail

§ 969.01(4) 1) Statutory considerations for releasing Def without bail, fixing reasonable bail, or imposing other reasonable conditions of release

a. Ability to give bail

b. Nature, number, gravity of alleged offense(s)

c. Potential penalties Def faces

d. Degree of violence involved

e. Prior criminal record

f. Character and reputation

g. Health

h. Residence

i. Character and strength of evidence presented

j. Probationary, parole, or extended supervision status

k. Bail status in other pending cases, including other release conditions

l. Whether Def bound over after prelim

m. Past forfeitures of bail or non-appearances

n. Violations of prior conditions of release

o. Fugitive status at time of arrest

p. Policy against unnecessary detention pending trial

2) Traditional ties to community

   a. Family ties

      - Marriage
      - Relatives in community

   b. Employment

      - Present—time of arrest
      - Former—within past 3 years
      - Other means of support

   c. Residence—present, past 5 years, birthplace

   d. Financial stake in community

      - Ownership of property
      - Business interest
      - Amount and nature of indebtedness
      - Savings

H. Conditions of Release

1) Required statutory conditions; person released on bail/bond shall

§ 969.02(4)
§ 969.03(2)
a. Not commit any crime

§ 969.02(4m)
§ 969.03(2m)
§ 940.49
b. Not intimidate victims or witnesses, nor cause or permit intimidation to be done on Def's behalf

§ 969.09(1)
c. Appear as Ct directs and submit to the orders and process of Ct

§ 969.10
d. Give written notice to the clerk of any change of address within 48 hours

§ 969.01(1)(a)
§ 969.01(4)
§ 969.02(3)(d)
§ 969.03(1)(e)
2) In addition to or in lieu of cash bail, as part of a bond, Judge may set nonmonetary conditions of release designed to

a. Protect public from serious harm, defined as:

§ 969.001(2m)

- Personal physical pain or injury, illness, impairment of physical condition, or death, including mental anguish or emotional harm attendant to pain or injury, illness, or death
- Damage to property over $2,500 in value
- Economic loss over $2,500 in value

b. Prevent intimidation of witnesses

c. Ensure Def's next Ct appearance

3) As conditions of bond, Judge may:

§ 969.02(3)(a)
§ 969.03(1)(a)

a. Give custody to designated individual or organization who agrees to supervise Def

§ 969.02(3)(b)
§ 969.03(1)(b)

b. Put restrictions on travel, associations, or place of abode

§ 969.02(3)(c)
§ 969.03(1)(c)

c. Prohibit possession of any dangerous weapon

§ 969.02(3)(d)
§ 969.03(1)(e)

d. Require return to custody after certain hours without charge for maintenance

§ 969.08(1)

- Def entitled to judicial review of this condition upon application; if not then released, Judge must set forth reasons for condition on the record

St ex rel Jacobus v St
208 Wis. 2d 39 (1997)

e. Prohibit consumption of alcohol

St v Taylor
226 Wis. 2d 490, 501
(Ct. App. 1999)

f. Prohibit consumption of illegal drugs

§ 969.02(3)(e)

g. If Def charged with violation of restraining order or injunction, may require Def to participate in mental health treatment, a batterer's intervention program, or individual counseling

§ 969.02(3)(d)
§ 969.03(1)(e)

h. Impose any other reasonable conditions designed to accomplish the above goals

St v Braun
152 Wis. 2d 500
(Ct. App. 1989)

4) Conditions of bail infringing Def's 1st Amendment rights require specific findings that condition necessary

St v Wilcenski
2013 WI App 21
346 Wis. 2d 145

5) Ct may not impose "blanket" conditions of release. Must consider Def's individual circumstances

St v Wilcenski
2013 WI App 21
346 Wis. 2d 145

6) Ordering treatment and monitoring of treatment does not violate Def's rights to privacy and freedom from unreasonable searches

§ 971.10(4)

7) May be continued even if speedy trial demand is violated

I. When conditions of bond can be enforced

St v Jacobs
2023 WI App 53
___ Wis. 2d ___
St v Orlik
226 Wis. 2d 527
(Ct. App. 1999)

1) Bail/bond statutes do not authorize enforcement of conditions of bond for a case when a Def is incarcerated or reincarcerated on that case

St v Dewitt
2008 WI App 134
313 Wis. 2d 794

a. Bond conditions operative only when Def posts any required bail and signs/undertakes bond

St v Wilcenski
2013 WI App 21
346 Wis. 2d 145
St v Dewitt
2008 WI App 134
313 Wis. 2d 794
RMC Form CR-203

b. Def not required to sign bond, but will remain in custody until Def does so

St v Dewitt
2008 WI App 134
313 Wis. 2d 794

c. Conditions operative if Def posts any required bail and signs bond, but remains in custody on other matters

J. Additional orders

§ 940.47

1) Separate orders prohibiting contact or keeping certain distance can be entered upon finding that knowing and malicious prevention or dissuasion has or is reasonably likely to occur, and may be enforced by contempt

St v Orlik
226 Wis. 2d 527, 539–40
(Ct. App. 1999)

2) Orders apply regardless of custody status

2. Reviewing Bail

§ 969.08(1)

A. Same statutory and traditional considerations as above

§ 969.08(2)	**B. Ct may consider violations of conditions of release as grounds to set or increase bail or modify conditions**
§ 969.08(1)	**C. Upon petition of either State or Def**
§ 969.08(1)	1) If not able to meet conditions of bail, Def entitled to review of conditions if in custody 72 hours after initial appearance
§ 969.08(1)	2) If not then released, Judge must set forth on record reasons for requiring continuation of conditions
§ 969.08(3), (4)	**D. Reasonable notice of review must be given to opposing party**
§ 969.08(5)	**3. Revocation of Bail for Commission of Serious Crime**
§ 969.08(5)(a)	**A. Written petition from DA required, alleging**
§ 969.08(5)(a)1.	1) Def on bail for "serious crime" under § 969.08(10)(b)
§ 969.08(5)(a)2.	2) Def committed another "serious crime" while on bail
§ 969.08(5)(a)3.	Copy of criminal complaint for new charge must be provided
§ 969.08(5)(b)1.	**B. Upon petition, Ct may issue warrant to bring Def before Ct**
§ 969.08(5)(b)	**C. Revocation hearing**
§ 969.08(5)(b)1.	1) Def given equivalent of initial appearance under § 970.02(1) and (6)
§ 969.08(5)(a), (b)1.	2) Def given copy of written petition of DA asking for revocation of bail
§ 969.08(5)(b)1.	3) Def can be held up to 7 days without bail
§ 969.08(5)(b)1.	4) Combined bail revocation hearing and prelim on new charge held before Ct
§ 969.08(5)(b)2., 3.	5) State must prove by clear and convincing evidence that new crime by Def occurred while Def on bail
§ 969.08(5)(b)2.	6) Rules of evidence apply

§ 969.08(5)(b)1. 7) Separate findings required regarding bail revocation and prelim on new charge

§ 969.08(5)(b)3., 4. 8) Upon finding that State carried its burden, Ct may revoke bail and hold Def for trial for up to 60 days without bail

Otherwise Def must be released on bail on appropriate conditions set by Ct

4. Revocation of Bail for Victim/Witness Intimidation

§ 940.48(3)
§ 940.49 **A. After hearing and upon substantial evidence of intimidation, any form of pretrial released can be revoked and/or bail forfeited**

B. Applies whether Def acted personally or behavior was caused or encouraged by Def

§ 969.13

5. Forfeiture of Bail

§ 969.13(1) **A. Bail shall be forfeited if conditions of bond not complied with**

RMC Form CR-230
§ 969.13(1) **B. By entry of order declaring bail forfeited**

§ 969.13(2) 1) Order may be set aside upon conditions Ct imposes if justice does not require enforcement of forfeiture

§ 969.13(3) 2) Clerk is agent for receipt of papers affecting Def's and surety's bond liability

§ 969.13(3) 3) No independent action required

§ 969.13(4) 4) Notice of order of forfeiture mailed to Def and surety

§ 969.13(4)
St v Achterberg
201 Wis. 2d 291 (1996) **C. Upon motion of DA, or sua sponte if justice so requires, Ct must enter judgment for State for amount of bond if Def does not surrender**

Provided surety or Def does not satisfy Ct within 30 days that failure to appear impossible and without Def's fault

Melone v St
2001 WI App 13
240 Wis. 2d 451
St v Ascencio
92 Wis. 2d 822
(Ct. App. 1979) **D. While forfeiture is mandatory upon a violation of a condition of bond, decision to set aside forfeiture is subject to Ct's discretion**

§ 969.14

E. Sureties may be discharged from bond obligations if

1) Arrest Def and deliver to sheriff

2) Deliver to sheriff certified copy of warrant and order admitting Def to bail

3) After completing 1) and 2), sureties apply to Ct for order discharging them from liability

§ 969.13(5)(a)

F. Forfeited cash bail to be applied FIRST to pay recompense to victim

§ 969.13(5)(b)

1) Ct must determine amount of recompense for victim, unless substantial reasons not to do so are stated on the record

§ 969.13(5)(b)

2) Ct must determine recompense in the same manner as it would determine restitution

6. Denial of Bail (Preventative Detention)

§ 969.035(2)

A. Ct may deny release to

1) Person accused of committing an offense under §§ 940.01, 940.225(1), 948.02(1) or (2), 948.025, or 948.085

2) Person accused of committing or attempting to commit violent crime and person has previous conviction for committing or attempting to commit a violent crime

§ 969.035(1)(b)

a. Violent crime is defined as any crime specified in §§ 940.01, 940.02, 940.03, 940.05, 940.06, 940.07, 940.10, 940.19(5), 940.195(5), 940.198 (2)(a) or (c), 940.21, 940.225(1), 940.23, 941.327, 948.02(1) or (2), 948.025, 948.03, or 948.085

Caution

NOTE: This definition of violent crime is different than the definition used to establish the grounds for setting cash bail.

§ 969.035(3)

B. Prehearing procedure

1) DA must

a. Allege Def eligible for denial of release under **Sec. 6.A.** above

b. Provide copy of complaint charging commission or attempted commission of present offense specified in **Sec. 6.A.** above

c. Allege that available conditions of release will not adequately protect community or prevent intimidation of witnesses

§ 969.035(4) 2) If Ct determines DA has complied, Ct may order detention of person in custody continued

Ct must give Def copy of documents provided by DA and inform of rights under §§ 969.035 and 970.02(1) and (6)

C. Pretrial detention hearing

§ 969.035(5) 1) Purpose: To determine whether continued detention of Def justified

2) May be held in conjunction with prelim or conditional release revocation hearing

Separate findings must be made relating to prelim, conditional release, and pretrial detention

3) Must be commenced within 10 days from date Def detained

§ 969.035(9) Delay caused by Def not included within 10-day time limit

§ 969.035(6) 4) Burden on State to prove by clear and convincing evidence that

a. Def committed offense specified in **Sec. 6.A.** above

b. Available conditions of release will not adequately protect community or prevent intimidation of witnesses

5) Rules of evidence apply

6) Rights of confrontation, to call witnesses, to cross-examination, and to counsel apply

§ 969.035(7), (8)

D. Findings

1) If burden not met and Def otherwise eligible, Ct must release Def

May impose conditions

2) If burden met, Ct may deny release to Def for additional period not to exceed 60 days after hearing

After 60 days, Def must be released

a. May impose conditions

§ 969.035(9)

b. Delay caused by Def not included in 60-day time limit

§ 969.035(10)

E. Def may petition for release in accordance with § 969.03 at any time

§ 969.035(11)

F. Ct must place case of detained Def on expedited trial calendar

7. Bail After Conviction

A. When release available

§ 969.01(2)(a)

1) Release allowed in Ct's discretion after conviction and before sentencing

Except may not release if 3rd or subsequent OWI conviction

§ 969.01(2)(b), (c)
St v Whitty
86 Wis. 2d 380, 388
(1978)

2) Release may be allowed in Trial Ct's discretion pending appeal after sentencing

St v Barnes
127 Wis. 2d 34
(Ct. App. 1985)

a. Monetary condition may be imposed

St v Taylor
205 Wis. 2d 664
(Ct. App. 1996)
St v Lipke
186 Wis. 2d 358
(Ct. App. 1994)

b. But misuse of discretion to impose cash bail if Def is indigent and no risk of future nonappearance

§ 969.01(2)(e)

3) Any Ct, Judge, or Justice authorized to grant bail after conviction may revoke order granting bail

B. Bail not available

St ex rel Shock v DHSS
77 Wis. 2d 362 (1977)

1) Bail not to be granted to probationer pending review of revocation

May be granted on underlying charge pending in Trial Ct

St v Shumate
107 Wis. 2d 460 (1982)

2) No authority to grant bail pending federal habeas corpus review

St v Braun
100 Wis. 2d 77, 85 (1981)

3) Bail not to be granted after sentencing merely for Def's personal accommodation

§ 809.31

C. Procedure for release on bail pending postconviction relief

§ 809.31(1)

1) Def must file motion in Trial Ct

§ 809.31(2)

2) Ct promptly holds hearing, determines motion, and states grounds for decision

§ 809.31(3)

3) Release may be granted if

§ 809.31(3)(a)

a. No substantial risk Def will not appear following conclusion of postconviction proceedings

§ 809.31(3)(b)

b. Def not likely to commit serious crime, intimidate witnesses, or interfere with administration of justice

§ 809.31(3)(c)

c. Def promptly prosecutes postconviction proceedings, and

§ 809.31(3)(d)

d. Postconviction proceedings not taken for purpose of delay

§ 809.31(4)

4) In determining motion, Ct must consider nature of crime, length of sentence, and other factors relevant to pretrial release

§ 809.31(6)

5) Ct must require Def to post bond in Trial Ct in accordance with § 969.09, and

6) Ct may impose terms and conditions

8. Disbursement of Bail After Conviction

§ 969.02(6)
§ 969.03(4)

A. Cash bail must be applied FIRST to pay restitution to victim; remainder then is applied toward costs and fines

St v Jones
2021 WI App 15
396 Wis. 2d 602

B. If case dismissed, even if read in, cash bail must be returned and may not be applied to restitution, costs, and fines imposed in other cases

9. List of Violent Crimes for Purposes of Bail Under § 969.001(3)

Statute	Violation
§ 940.01 or 940.02	First-degree intentional homicide or first-degree reckless homicide
§ 940.03	Felony murder
§ 940.05 or 940.06	Second-degree intentional homicide or second-degree reckless homicide
§ 940.07	Homicide resulting from negligent control of vicious animal
§ 940.08	Homicide by negligent handling of dangerous weapon, explosives or fire
§ 940.09(1)	Homicide by intoxicated use of vehicle
§ 940.10	Homicide by negligent operation of vehicle
§ 940.11	Mutilating or hiding a corpse
§ 940.12	Assisting suicide
§ 940.19(1), (2), (4), (5), or (6)	Battery; substantial battery; aggravated battery
§ 940.195 (1), (2), (4), (5), or (6)	Battery to an unborn child; substantial battery to an unborn child; aggravated battery to an unborn child
§ 940.198(2) or (3)	Physical abuse of an elder person (intentional or reckless)
§ 940.20	Battery: special circumstances (by prisoner, etc.)
§ 940.201(2)	Battery or threat to witnesses
§ 940.203(2)	Battery or threat to an officer of the court or law enforcement officer
§ 940.204	Battery or threat to health care providers and staff
§ 940.205(2)	Battery or threat to department of revenue employee
§ 940.207(2)	Battery or threat to department of safety and professional services or department of workforce development employee
§ 940.208	Battery to certain employees of counties, cities, villages, or towns
§ 940.21	Mayhem
§ 940.225(1), (2), or (3)	First-, second-, or third-degree sexual assault
§ 940.23	Reckless injury
§ 940.235	Strangulation and suffocation
§ 940.24	Injury by negligent handling of dangerous weapon, explosives, or fire
§ 940.25	Injury by intoxicated use of a vehicle
§ 940.285	Abuse of individuals at risk
§ 940.29	Abuse of residents of penal facilities
§ 940.30	False imprisonment
§ 940.302(2)	Human trafficking
§ 940.305	Taking hostages
§ 940.31	Kidnapping
§ 940.32	Stalking
§ 940.43	Intimidation of witnesses
§ 940.45	Intimidation of victims
§ 941.20	Endangering safety by use of dangerous weapon
§ 941.21	Disarming a peace officer
§ 941.28	Possession of short-barreled shotgun or short-barreled rifle
§ 941.2905	Straw purchasing of firearms
§ 941.292	Possession of a weaponized drone
§ 941.30	Recklessly endangering safety
§ 941.327	Tampering with household products
§ 941.38(2) or (3)	Criminal gang member solicitation or contact
§ 941.39	Victim, witness, or co-actor contact
§ 943.01(2)(c)	Damage to property of grand or petit juror
§ 943.011	Damage or threat to property of witness
§ 943.013	Criminal damage; threat; property of judge

Statute	Violation
§ 943.02	Arson of buildings; damage of property by explosives
§ 943.04	Arson with intent to defraud
§ 943.06	Molotov cocktails
§ 943.10	Burglary
§ 943.231(1) or (2)	Carjacking
§ 943.30	Threats to injure or accuse of crime
§ 943.32	Robbery
§ 943.87	Robbery of a financial institution
§ 946.43	Assaults by prisoners
§ 947.013	Harassment
§ 947.015	Bomb scares
§ 948.02(1) or (2)	First- or second-degree sexual assault of a child
§ 948.025	Repeated acts of sexual assault of the same child
§ 948.03(2), (3), or (5)	Physical abuse of a child
§ 948.04	Causing mental harm to a child
§ 948.05	Sexual exploitation of a child
§ 948.051	Child trafficking
§ 948.055	Causing a child to view or listen to sexual activity
§ 948.06	Incest with a child
§ 948.07	Child enticement
§ 948.08	Soliciting a child for prostitution
§ 948.085	Sexual assault of a child placed in substitute care
§ 948.095	Sexual assault of a child by a school staff person or a person who works or volunteers with children
§ 948.30(2)	Abduction of another's child
§ 948.55	Leaving or storing a loaded firearm within the reach or easy access of a child
§ 951.02	Mistreating animals
§ 951.08	Instigating fights between animals
§ 951.09	Shooting at caged or staked animals
§ 941.26 (felony violation)	Machine guns and other weapons; use in certain cases
§ 813.12, 813.122, or 813.125	Domestic abuse restraining orders and injunctions, child abuse restraining orders and injunctions, or restraining orders and injunctions for individuals at risk
§ 939.30, 939.31, or 939.32	Solicitation, conspiracy, or attempt to commit a Class A felony
§ 939.621 or 939.63(1)	Violation to which a penalty enhancer may be applied for certain domestic abuse offenses or for use of a dangerous weapon

CR 9: PRELIM/ARRAIGNMENT

PRELIMINARY EXAMINATION .... **CR 9-1**
1. Nature of Preliminary Examination .... CR 9-1
2. Waiver .... CR 9-3
3. Time Limitations .... CR 9-3
4. Procedure .... CR 9-5
5. Conclusion of Hearing .... CR 9-11
6. Juveniles .... CR 9-11
7. Review .... CR 9-11
8. Errors .... CR 9-12

ARRAIGNMENT .... **CR 9-12**
1. Information Filed .... CR 9-12
2. "Instant Arraignments" .... CR 9-12
3. Duties at Arraignment .... CR 9-13
4. Presence of Defendant .... CR 9-13

PRELIMINARY EXAMINATION

1. Nature of Preliminary Examination

§ 970.03(1)
St v Webb
160 Wis. 2d 622
(1991)

St v Richer
174 Wis. 2d 231
(1993)

A. Purpose

1) Summary proceeding to determine whether probable cause to believe felony committed by Def

   a. Determine whether Def should be subjected to criminal prosecution and further deprived of liberty

   b. Prevent hasty, malicious, improvident, and oppressive prosecutions

   c. Protect Def from open and public accusations of the crime

   d. Avoid, for Def and public, expense of a trial

   e. Save Def from humiliation and anxiety involved in public prosecution

   f. Discover whether there are substantial grounds for prosecution

2) For Juv subject to original jurisdiction in adult Ct, *see* **CR 51**

St v Berby
81 Wis. 2d 677, 683
(1978)

B. Standard

1) Probable cause for bindover of Def at prelim is greater than probable cause for issuance of arrest warrant

St v Knoblock
44 Wis. 2d 130, 134
(1969)

a. Guilt beyond a reasonable doubt need not be proved

St v Dunn
121 Wis. 2d 389 (1984)
St v Schaab
2000 WI App 204
238 Wis. 2d 598

b. If conflicting inferences are equally plausible from undisputed facts, bindover required

2) Plausibility of story, not credibility of witnesses, is standard

St v Wolverton
193 Wis. 2d 234
(1995)
St v Richer
174 Wis. 2d 231, 243
(1993)
St v Watkins
40 Wis. 2d 398, 401
(1968)

C. Right to prelim is statutory but implicates certain constitutional rights

St v Richer
174 Wis. 2d 231, 242
(1993)
St v Neudorff
170 Wis. 2d 608, 617
(Ct. App. 1992)

1) Proceeding must be adequate to fulfill Def's constitutional right to know nature and cause of charges that must be defended against

St ex rel Lynch v Circuit Ct for Dane Cty
82 Wis. 2d 454 (1978)

2) Prelim not discovery device, and Def has no right to exculpatory evidence or inspection of prosecutor's files

St v Schaefer
2008 WI 25
308 Wis. 2d 279

a. Def cannot compel production of police reports before, or at, preliminary examination by subpoena duces tecum

§ 971.31(5)(b)

3) Motions to suppress evidence obtained by search warrant not available

D. Prelim not required when

§ 970.02(1)(c)
St v C&S Mgmt Co
198 Wis. 2d 844, 847
(Ct. App. 1995)

1) Def is corporation or LLC

§ 970.03(1), § 970.02(1)(c)

2) Def is charged with a misdemeanor

§ 970.02(1)(c), (4)

3) Def waives right to prelim

   a. In writing, or

   b. In open Ct

2. Waiver

A. Advise Def of rights and benefits of prelim

B. See Wis JI-Cr SM-31 for suggested colloquy

Wis JI-Cr SM-31

C. Finding of waiver

"The Ct finds that the Def's waiver is knowing and voluntary"

D. Actions of Ct after waiver

§ 970.02(4)

1) Bind Def over to Trial Ct for arraignment and further proceedings

2) Continue Def's bail or admit Def to bail under Ch 969

3. Time Limitations

A. Prelim must be commenced

§ 970.03(2)

1) Within 20 days after initial appearance if Def released from custody or bail is set at $500 or less

§ 970.03(2)

2) Within 10 days if Def in custody AND bail fixed in excess of $500

§ 970.03(2)

3) Time may be extended on stipulation of parties or on motion for cause

St v Selders
163 Wis. 2d 607
(Ct. App. 1991)

4) Whether to adjourn for cause is within Trial Ct's discretion, after considering

   a. Justification for adjournment

   b. Possible prejudice to opposing party

   c. Public interest

      - Convenience of witnesses
      - Convenience of administration of justice
      - Rights of victim

St v Lee
2021 WI App 12, ¶ 58
396 Wis. 2d 136

   d. If based on delays in SPD appointment of counsel, cost and ability to appoint counsel at Cty expense; whether Def remains in custody (and, if so, the liberty interests affected by and costs of remaining in custody); whether Def will be subject to further evidence-gathering while incarcerated; and whether delay could compromise defense or result in lost evidence

St v Horton
151 Wis. 2d 250
(Ct. App. 1989)

5) Statutory time limits do not apply if case remitted to Trial Ct after interlocutory appeal

B. Violation of time limitations

Logan v St
43 Wis. 2d 128, 138
(1969)
St v Lee
2021 WI App 12
396 Wis. 2d 136

1) Violation of time limitations deprives Ct of personal jurisdiction over the charged case

Armstrong v St
55 Wis. 2d 282, 285
(1972)

Def may be recharged to regain personal jurisdiction because jeopardy has not yet attached

Godard v St
55 Wis. 2d 189, 190
(1972)

2) Def's failure to object to violation of time limitations waives loss of personal jurisdiction

St v Robles
157 Wis. 2d 55
(Ct. App. 1990)
aff'd, 162 Wis. 2d 883
(1991)

3) Def waives time defect by failing to bring in-custody status to Ct's attention when Ct relied on Def's representations regarding release

4. Procedure

A. In general

§ 971.04(1)(d)
§ 885.60

1) Def must be present personally or by telephone or audiovisual means

§ 906.15(2)(d)
§ 950.04(1v)(b)

2) Ct may not exclude victims from evidentiary proceeding unless it is necessary for fair proceeding

§ 970.03(5)

3) All witnesses sworn and transcript made

§ 970.03(13)

Testimony may be taken by telephone or by live AV means if proponent shows good cause or if testimony used to prove element of identity offense under § 943.201(2) or § 943.203(2)

§ 970.03(1)

4) May be held in conjunction with bail revocation hearing under § 969.08(5)(b), provided Ct makes separate findings relating to prelim and to bail revocation

§ 969.035(5)

5) May be held in conjunction with pretrial detention hearing, but separate findings required

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

6) Presumption that prelim open to public, even in sexual assault cases, notwithstanding § 970.03(4)

A qualified 6th Amendment right to a public trial applies to closure of prelim

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)
St v Webb
154 Wis. 2d 320
(Ct. App. 1990)
rev'd on other grounds
160 Wis. 2d 622 (1991)

7) When request by complaining witness in sexual assault case to close prelim, follow these procedures

   a. Party seeking closure must show overriding interest likely to be prejudiced by open hearing

   b. Closure must be no broader than necessary to protect the overriding interest

   c. Must consider reasonable alternative to closing proceeding

   d. Ct must make finding adequate to support closure

Globe Newspaper Co
v Superior Ct
102 S. Ct. 2613 (1982)

e. Factors to consider

- Victim's age
- Victim's psychological maturity and understanding
- Nature of crime
- Desires of victim and victim's family

St v Wilkens
159 Wis. 2d 618
(Ct. App. 1990)

8) Counsel may make decision to assert or waive option of having prelim public or closed, especially when Def does not oppose counsel's decision

If no objection to closure, right to object waived

St v Oliver
161 Wis. 2d 140
(Ct. App. 1991)

B. Rules of evidence apply as at trial with exceptions

§ 970.038
St v O'Brien
2014 WI 54
354 Wis. 2d 753
St v Hull
2015 WI App 46
363 Wis. 2d 603

1) Hearsay admissible

§ 971.31(5)(b)

2) Objections to admissibility of statements of Def not available

§ 970.03(12)

3) Reports from the following to be received without calling expert who made findings

a. State Crime Lab

b. State Laboratory of Hygiene

c. FBI investigation laboratory

d. Hospital laboratory

e. Local health Dept

C. Def has right to

§ 971.31(5)(c)	1) Challenge sufficiency of complaint Must be done before commencement of prelim, or deemed waived
Sparkman v St 27 Wis. 2d 92 (1965)	2) Counsel
§ 971.20(3)	3) Substitution of Judge or Ct Comm'r NOTE: Substitution at prelim exhausts right to substitution for duration of case, even if used for substitution of Ct Comm'r.
§ 970.05	4) Transcript
§ 970.03(6)	5) Sequestration and exclusion of witnesses
§ 970.03(5) *St v McCarter* 36 Wis. 2d 608 (1967)	6) Call witnesses on behalf of self
St v Schaefer 2008 WI 25, ¶¶ 32–40 308 Wis. 2d 279 *St v O'Brien* 2013 WI App 97 349 Wis. 2d 667, *aff'd*, 2014 WI 54 354 Wis. 2d 753	a. Cannot be called merely to discover State's case or demonstrate inconsistency in testimony of State's witness
St v Hull 2015 WI App 46, ¶ 33 363 Wis. 2d 603	b. Def may not call alleged victim unless the anticipated testimony is relevant to the issue of probable cause. Weight and credibility of the State's evidence is outside the scope of the prelim
	7) Cross-examine State's witnesses
Vigil v St 76 Wis. 2d 133 (1977)	a. Attack on credibility should be directed towards plausibility of story, not general trustworthiness of witness

St v Wolverton
193 Wis. 2d 234 (1995)
St v McCarter
36 Wis. 2d 608 (1967)

b. Right not unrestricted

St v Knudson
51 Wis. 2d 270 (1971)

c. No right to fish for elements of State's case

§ 906.12

d. Right to examine materials used by State's witnesses to refresh recollection

St v Russo
101 Wis. 2d 206
(Ct. App. 1981)

e. May examine experts as to qualifications, textual sources, tests

§ 970.03(12)(b)

- No right to cross-examine expert whose reports admissible under special prelim rule of admissibility

D. Def does not have right to

St ex rel Funmaker v Klamm
106 Wis. 2d 624, 634
(1982)

1) Make closing argument

Decision to allow closing argument within sound discretion of Judge

2) Confront witnesses

St v Marshall
92 Wis. 2d 101 (1979)

3) Introduce impeachment evidence

St v Schaefer
2008 WI 25
308 Wis. 2d 279

4) Compel production of police reports before, or at, preliminary examination by subpoena duces tecum

E. Function of Ct—single and multiple related counts

St v Akins
198 Wis. 2d 495 (1996)

1) Determine whether Def probably committed a felony

St v Williams
198 Wis. 2d 516 (1996)

2) When two or more transactionally or factually related counts are charged and probable cause found in relation to one count, bindover required on all transactionally or factually related counts

a. Ct determines whether a felony was probably committed in the context of the facts related to a count in the complaint, not whether State has shown probable cause for any specific count in the complaint

St v Akins
198 Wis. 2d 495 (1996)

3) Judge not to make finding nor engage in discussion as to precise felony on which Def bound over

§ 970.03(10)
St v Williams
198 Wis. 2d 516 (1996)

4) Multiple-count complaint: Suggested three-step procedure

a. Read complaint to identify transactionally related counts

St v Richer
174 Wis. 2d 231 (1993)

- "Transactionally related" means charges related to each other from evidentiary or transactional viewpoint based upon evidence at prelim
  - — Need more than same elements and same Def

St v Williams
198 Wis. 2d 516 (1996)

  - — [Apparently] synonymous with "not wholly unrelated" and "common nucleus of facts"

St v Burke
153 Wis. 2d 445 (1990)

  - — Factors include same parties, witnesses, geographical proximity, time, physical evidence, motive, and intent

St v Richer
174 Wis. 2d 231 (1993)

  - — Above factors must be considered as components of broader test of transactional relationship. Counts may be transactionally related even if not all seven factors are satisfied, despite language in *Burke* (and *Williams*) that suggests all must be present

b. If probable cause to believe a felony was committed, bind Def over on all transactionally related counts

c. If no probable cause felony was committed in conjunction with a set of transactionally related counts, Ct must dismiss all such counts

- State may not recharge dismissed counts in information or charge additional counts arising from that common nucleus of facts

§ 906.11

5) Ct may suspend progress of State's case when it is of opinion that sufficient evidence introduced

   a. Care must be taken not to deny Def's rights to cross-examine and call witnesses

   b. When there is further evidence by defense, if persuasive to Ct, State may present added evidence in furtherance of its case

F. Function of Ct—multiple unrelated counts

St v Street
202 Wis. 2d 533
(Ct. App. 1996)

State must establish probable cause that Def committed a felony with respect to each transactionally distinct count in complaint

G. Probable cause

St v Olson
75 Wis. 2d 575 (1977)

1) Facts, together with any reasonable inferences, which lead reasonable person to conclude that a crime has probably been committed and that Def probably committed it

St v Sauceda
163 Wis. 2d 553
(Ct. App. 1991)
rev'd on other grounds
168 Wis. 2d 486 (1992)

2) Wis Cts follow "totality of circumstances" approach to evaluating probable cause

St v Sorenson
143 Wis. 2d 226 (1988)

3) Probable cause satisfied when there exists believable or plausible account of Def's commission of felony

St v Dunn
121 Wis. 2d 389 (1984)
St v Schaab
2000 WI App 204
238 Wis. 2d 598

   a. Even if contrary but believable account also exists in record, Ct cannot weigh State's case against evidence favorable to Def

St ex rel Huser
v Rasmussen
84 Wis. 2d 600 (1978)

   b. Not proper forum to debate and determine issue of credibility and weight of evidence once essential facts as to probability have been established

St v Lindholm
2000 WI App 225
239 Wis. 2d 167

4) Probable cause must be proved for prior convictions that change nature of charge from misdemeanor to felony

St v Fry
129 Wis. 2d 301
(Ct. App. 1985)

5) Def's uncorroborated confession sufficient to support finding of probable cause

St v Moats
156 Wis. 2d 74 (1990)

6) Bindover may be based solely on unconstitutionally obtained evidence

5. Conclusion of Hearing

§ 970.03(7)

A. Bind Def over for trial if probable cause to believe Def committed a felony

§ 970.03(8)

B. If probable only misdemeanor committed, amend complaint to conform to evidence

§ 970.03(9)
St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

C. If no probable cause found for any crime, order dismissal without prejudice

§ 970.04
St v Johnson
231 Wis. 2d 58
(Ct. App. 1999)

Def may be recharged when DA has or discovers new evidence

6. Juveniles

Recommendation

See **CR 51—Reverse Waiver**

7. Review

St ex rel Dowe v Waukesha Cty Cir Ct
184 Wis. 2d 724 (1994)
St v Gillespie
2005 WI App 35
278 Wis. 2d 630
St v Johnson
231 Wis. 2d 58
(Ct. App. 1999)

Bindover decision reviewable by motion to dismiss. De novo review is not available

8. Errors

St v Webb
160 Wis. 2d 622 (1991)

Any error at preliminary hearing is cured by errorless trial

ARRAIGNMENT

1. Information Filed

§ 971.01(2)
St v Phillips
2000 WI App 184
238 Wis. 2d 279

A. Information must be filed within 30 days after decision to bind over

1) Motion may be made to extend time

2) Failure to timely file—dismissed without prejudice

St v White
2008 WI App 96
312 Wis. 2d 799
St v Bury
2001 WI App 37
241 Wis. 2d 261

B. Information may allege additional charges, not heard at prelim, so long as "transactionally related"

1) "Transactionally related" is synonymous with "not wholly unrelated"

2) Transactionally related charge may be added to the information, even if Def not allowed cross-examination on that charge at the prelim

St v Cotton
2003 WI App 154
266 Wis. 2d 308

C. Information alleging completely new charges (not containing any original charges) must be supported by sufficient evidence at prelim to show probable cause Def committed those new offenses

2. "Instant Arraignments"

Felonies: Arraignment may be in Trial Ct or Ct that conducted prelim or accepted waiver of prelim

3. Duties at Arraignment

§ 971.05

A. Arraignment must be in open Ct

§ 971.05(2), 970.02(6)

B. Inform unrepresented Def of right to counsel

§ 971.05(3)

C. Deliver copy and read information to Def, unless waived

D. Ask how Def pleads to charge

E. Enter plea of not guilty, if Def stands mute

F. Accept plea or schedule trial or other necessary hearings

§ 971.31(5)(a)

G. Set time for filing written motions

10 days in felony cases unless Ct orders otherwise

4. Presence of Defendant

§ 971.04(1)(a)

A. Felony cases

Def must be present at arraignment, either personally or by telephone or audiovisual means

§ 971.07

B. Co-Defs may be arraigned separately or together, in Ct's discretion

St v Kaye
106 Wis. 2d 1 (1982)
St v Kalk
2000 WI App 62
234 Wis. 2d 98
See Wis JI-Cr SM-45

Consider any apparent conflicts of interest for counsel representing more than 1 Def

CR 10: DISCOVERY AND INSPECTION

1. General .... CR 10-1
2. Timing of Statutory Discovery Motions .... CR 10-2
3. Types of Statutory Discovery Provided .... CR 10-2
4. Other Specific Discovery Rights .... CR 10-7
5. Exculpatory Information .... CR 10-10
6. Preservation of Exculpatory Evidence .... CR 10-15
7. Postconviction Discovery Issues .... CR 10-16

1. General

Wold v St
57 Wis. 2d 344 (1973)
St ex rel Johnson v Waukesha Cty Ct
41 Wis. 2d 188, 192 (1968)

A. Wisconsin recognized no "clear legal right" to pretrial discovery before 1970 Criminal Code

§ 971.23

B. Limited discovery and inspection now statutorily provided

St ex rel Lynch v Cty Ct
82 Wis. 2d 454 (1978)

1) Ct may not order general inspection of prosecution files before prelim

   a. Inherently harmful to orderly administration of justice

St v Schaefer
2008 WI 25
308 Wis. 2d 279

   b. Police reports cannot be compelled by subpoena duces tecum

Arizona v Youngblood
109 S. Ct. 333 (1988)

2) Prosecutor has no constitutional duty routinely to deliver entire file to defense counsel

Brady v Maryland
83 S. Ct. 1194 (1963)

C. Additional discovery required as matter of due process, when

1) Evidence favorable to accused

2) Evidence material to either guilt or punishment

Upjohn v US
101 S. Ct. 677 (1981)

D. Atty-client privilege and work-product doctrine limit State's discovery rights

2. Timing of Statutory Discovery Motions

§ 971.31(5)(b)	**A. Felonies**
§ 971.31(5)(b)	1) Motions for statutory discovery may not be made
	a. At prelim
§ 971.31(5)(b)	b. Until an information filed
§ 971.31(5)(a)	2) Must be filed within 10 days after arraignment, unless Ct otherwise permits
§ 971.31(5)(a)	**B. Misdemeanors**
	1) Must be filed within 10 days after initial appearance, unless Ct otherwise permits

3. Types of Statutory Discovery Provided

§ 971.23(1) *St v DeLao* 2002 WI 49 252 Wis. 2d 289 *Jones v St* 69 Wis. 2d 337 (1975)	**A. Duty of State to disclose within reasonable time before trial if within possession, custody, or control of DA or law enforcement**
§ 971.23(1)(a) *Wold v St* 57 Wis. 2d 344 (1973)	1) Any written or recorded statement of Def
§ 971.23(1)(b) *Kutchera v St* 69 Wis. 2d 534 (1975)	2) Any written summaries of all oral statements of Def intended to be used in trial and names of witnesses to those statements
St v DeLao 2002 WI 49 252 Wis. 2d 289	a. Standard is objective, i.e., what reasonable prosecutor would plan to use
§ 971.23(1)(c)	3) Copy of Def's criminal record
§ 971.23(1)(d) *Lunde v St* 85 Wis. 2d 80 (1978) *St v Sandoval* 2009 WI App 61 318 Wis. 2d 126 *Konkol v St* 2002 WI App 174 256 Wis. 2d 725	4) List of all witnesses and their addresses, except those to be called for rebuttal or impeachment only

§ 971.23(1)(e)
St v Thomas
150 Wis. 2d 374 (1989)
St v Copening
100 Wis. 2d 700 (1981)

5) Any relevant written or recorded statements of a witness named under § 971.23(1)(d) and

   a. Any audiovisual recording of oral statement of a child under § 908.08

   b. Expert reports or summaries including

      - Physical exams
      - Mental exams
      - Scientific tests or comparisons

§ 971.23(1)(f)
Jones v St
69 Wis. 2d 337 (1975)

6) Criminal record of prosecution witness known to State

§ 971.23(1)(g)

7) Any physical evidence DA intends to offer in evidence at trial

   a. Duty of State to preserve specimens

California v Trombetta
104 S. Ct. 2528 (1984)
St v Pankow
144 Wis. 2d 23
(Ct. App. 1988)

      - No duty to preserve samples, even if useful to Def, unless Def shows
         - — Bad-faith destruction by State, and
         - — Evidence had apparent exculpatory value before its destruction, and
         - — No comparable evidence on same subject matter available to Def

Arizona v Youngblood
109 S. Ct. 333 (1988)
St v Greenwold
189 Wis. 2d 59
(Ct. App. 1994)

      - Due process does not require State to preserve evidence merely potentially exculpatory

§ 165.79(1)
St v Lee
192 Wis. 2d 260
(Ct. App. 1995)
CAUTION:
197 Wis. 2d 959
(1996) vacates *St v Lee*

   b. Defendants may be entitled to have the Crime Lab conduct tests on their behalf if the Ct in its discretion considers

- That Crime Lab has ability to do analysis
- Costs or other burdens of performing the analysis
- Def's ability to have tests done independently
- Potential value of test results to Def
- Effect results may have on trial or need to have a trial

§ 971.23(1)(h) 8) Any exculpatory evidence

§ 971.23(2m) **B. Duty of Def to disclose within a reasonable time before trial**

§ 971.23(2m)(a) 1) List of all witnesses excluding Def, rebuttal, or impeachment witnesses

§ 971.23(2m)(am) a. Any relevant written or recorded statements of a witness, including expert reports and summaries about

- Physical exams
- Mental exams
- Scientific testing

St v Revels
221 Wis. 2d 315
(Ct. App. 1998)

b. If an expert to be called at trial has not prepared a report, the defense may be required to provide a summary of expert's findings or a statement of the subject matter of the testimony, and to disclose results of any scientific test, experiment, or comparison

St v McClaren
2009 WI 69
318 Wis. 2d 739

c. Ct may order Def who claims self-defense to produce summary of evidence of violent acts committed by the victim, which Def knew about at the time of the crime and which bear on the reasonableness of the self-defense claim. *See McMorris v State*, 58 Wis. 2d 144 (1973)

§ 971.23(2m)(b) 2) Criminal record of a Def witness, which is known to DA

§ 971.23(2m)(c) 3) Any physical evidence that Def intends to offer in evidence at trial

§ 971.23(5)

C. Scientific testing and psychiatric testing

St v Stanislawski
62 Wis. 2d 730 (1974)
Wold v St
57 Wis. 2d 344 (1973)

1) On a motion of a party, Ct may order the production of any item of physical evidence that is intended to be introduced at trial for scientific analysis

   a. Under such terms and conditions as Ct may prescribe

§ 971.23(5c)

2) In prosecutions for sexually motivated offenses, Ct may not condition testimony of any witness on submission to psychiatric or psychological test to assess credibility

§ 971.23(6)

D. Protective order

St v Bowser
2009 WI App 114
321 Wis. 2d 221

1) Upon motion of a party, Ct may at any time order that discovery, inspection, or the listing of witnesses requested be denied

2) If either party certifies that witness may suffer physical or economic harm, Ct may order a deposition under § 967.04(2)–(6)

3) Name of witness need not be divulged before deposition

4) Deposition admissible at trial if witness becomes unavailable or for impeachment

§ 971.23(6m)

E. In camera proceedings

1) Either party may move for an in camera inspection by Ct of any document required to be disclosed for the purpose of masking or deleting any material not relevant to case being tried

§ 905.10

2) Proceedings to determine whether identity of informant should be disclosed to the defense must be conducted in camera

§ 971.23(7)

F. Continuing duty to disclose

1) If before or during trial, party discovers additional material or the names of additional witnesses requested, which are subject to discovery, inspection, or production, party shall promptly notify other party of the existence of the additional material or names

§ 971.23(7m)

G. Sanction for failure to comply

§ 971.23(7m)(a)
Taylor v Illinois
108 S. Ct. 646 (1988)
St v Prieto
2016 WI App 15
366 Wis. 2d 794
St v Wild
146 Wis. 2d 18
(Ct. App. 1988)

1) Ct shall exclude any witness not listed or evidence not presented for inspection or copying that is required, unless good cause is shown for failure to comply

   a. Ct may grant opposing party a recess or continuance

St v Miller
2004 WI App 117
274 Wis. 2d 471

   b. If State's evidence is excluded before trial because of discovery violation and Ct then dismisses charges without prejudice, State is not precluded from refiling the same charges

§ 971.23(7m)(b)
Taylor v Illinois
108 S. Ct. 646 (1988)

2) In addition to or in lieu of any sanction, Ct may advise jury of any failure or refusal to disclose

St v Hahn
221 Wis. 2d 670
(Ct. App. 1998)

3) Imposition of a sanction for violation of Ct's discovery order is within Trial Ct's discretion

H. Notice of alibi

§ 971.23(8)(a)

1) Def must give DA notice of intent to rely on alibi as defense at arraignment or at least 30 days before trial

   a. Notice must state with particularity place where Def claims to have been when crime alleged to have been committed

   b. Names and addresses of witnesses to alibi must be included, if known

St v Burroughs
117 Wis. 2d 293 (1984)
Alicea v Gagnon
675 F2d 913
(7th Cir 1982)

   c. CAUTION: May be unconstitutional as applied

2) State may not comment on Def's failure to call some or all of alibi witnesses or withdrawal of alibi as a defense

   a. If Def withdraws alibi at close of State's case

   b. Or, if Def does not call some or any of alibi witnesses during own case

3) State may call alibi witness of defense for any purpose other than to impeach Def's credibility regarding alibi notice

§ 971.23(8)(b)

4) No evidence of alibi to be received if no notice of alibi given, unless Ct orders for cause

§ 971.23(8)(c)

a. Ct may enlarge time for filing notice of alibi

§ 971.23(8)(d)

5) State must furnish notice in writing to defense of names and addresses, if known, of witnesses to be offered in rebuttal to alibi

a. Notice must be furnished within 20 days after receipt of Def's notice of alibi, or within other time as Ct orders

b. No rebuttal evidence of alibi received if State fails to give notice, unless Ct otherwise orders for cause

§ 971.23(8)(d), (e)

6) Any witness called pertaining to alibi must be identified as such on written lists

§ 971.23(10)

I. Copying costs in cases involving indigent Defs

1) For item discoverable, SPD shall pay any fee charged for the copies

Wis Adm Code Ch PD 3

2) Fee for copies may not exceed the applicable maximum fee for copies of discoverable materials that is established by rule under § 977.02(9)

§ 971.23(5), (9)
§ 972.11(1)
St v Peters
192 Wis. 2d 674
(Ct. App. 1995)

J. Admissibility of DNA evidence results

1) See **CR 28**

4. Other Specific Discovery Rights

A. Confidential and privileged records

§ 146.82(1)

1) Patient health care records are confidential

§ 146.82(2)(a)4.

Confidential patient health care records may be disclosed pursuant to a lawful order of a Ct of record

Wis Const art. I, § 9m
St v Johnson
2023 WI 39
407 Wis. 2d 195

2) Patients have a privilege to refuse and prevent disclosure of confidential communications made or information obtained or disseminated for diagnosis or treatment of physical, mental, or emotional condition

§ 905.04(4)(b)

   a. There are exceptions regarding Ct-ordered examinations in guardianship or protective placement

   b. There is no such exception for Ct-ordered in camera review of a victim's privately held, privileged health records upon a criminal Def's motion

PRACTICE RECOMMENDATION: Def may request waiver of the privilege and release of the records, but there is no remedy should victim decline.

§ 905.11
St v Speese
191 Wis. 2d 205
(Ct. App. 1995)
rev'd on other grounds
199 Wis. 2d 597 (1996)

3) Privilege is waived if the holder voluntarily discloses or consents to disclosure of the confidential matter or communication or any significant part thereof

§ 48.396(2)
§ 48.78(2)(a)
§ 938.396(2)
§ 938.78(2)(a)
Pennsylvania v Ritchie
107 S. Ct. 989 (1987)
Rock Cty Dept of Soc Servs v DeLeu (In Int of KKC)
143 Wis. 2d 508
(Ct. App. 1988)

4) Criminal Def may seek in camera review by Juv Ct Judge of any type of Juv record, including Juv Ct file itself

St v Rizzo
2002 WI 20
250 Wis. 2d 407
overruled in part on other grounds by
St v Johnson
2023 WI 39
407 Wis. 2d 195
St v Jensen
147 Wis. 2d 240 (1988)

B. Victims of sexual assault: Def's right to have own expert(s) perform examination of victim

1) Applies only if State intends to introduce expert testimony of examining psychologist at trial, whose examination done at request of State and

2) Def must prove a "compelling need" for own expert(s) which Ct determines by considering following factors

   a. Nature of examination

b. Victim's age

c. Potential physical and emotional effects on victim

d. Probative value to issues in case

e. Time between offense date and proposed exam

f. Other available evidence

g. If personal exam essential to formation of opinion by the expert

St v Maday
179 Wis. 2d 346
(Ct. App. 1993)

3) If victim refuses to participate in exam, appropriate sanction is to prevent State's expert from testifying about exam

§ 971.23(5c)

a. However, if prosecution for sexual assault (under §§ 940.225, 948.02, or 948.025) or for any other crime that Ct determines was sexually motivated, as defined in § 980.01(5), Ct may NOT order any witness or victim, as a condition of allowing testimony, to submit to a psychiatric or psychological examination to assess his or her credibility

St v Mainiero
189 Wis. 2d 80
(Ct. App. 1994)

4) If victim seeks out professional help on own, disclosure rules under *Ritchie* apply and not those under *Maday*

C. Mental health records of Def who enters NGI plea

§ 51.30(4)(b)4.
St v Taylor
142 Wis. 2d 36
(Ct. App. 1987)

1) NGI plea eliminates privilege and confidentiality

Billy Jo W v Metro
(In re Mental Cond
of Billy Jo W)
173 Wis. 2d 310
(Ct. App. 1992)
rev'd on other grounds
182 Wis. 2d 616 (1994)

2) However, release under § 51.30(4)(b)4. must be limited to those providing services to the subject or relevant to an issue before the Ct

§ 905.10(3)(b)
St v Nellessen
2014 WI 84
360 Wis. 2d 493

D. Confidential informers: Defense request to disclose

1) State may claim a privilege to refuse to disclose identity of an informer

St v Nellessen
2014 WI 84
360 Wis. 2d 493

2) If Def makes initial showing of reasonable possibility, grounded in the facts and circumstances of the case, that a confidential informer may have information necessary to the Def's theory of defense, Ct must conduct in camera review to determine whether informant may be able to provide relevant testimony

3) Proof in camera will usually be by affidavit. Ct may take testimony if Ct finds that matter cannot be resolved satisfactorily by affidavit

St v Vanmanivong
2003 WI 41
261 Wis. 2d 202

4) Disclosure is necessary only if informer's testimony could create reasonable doubt in jurors' minds

5) If Judge finds reasonable probability that informer can give testimony and State refuses to disclose identity, sanction is dismissal of charges to which testimony would relate

5. Exculpatory Information

A. Standard

§ 971.23(1)(h)
Brady v Maryland
83 S. Ct. 1194 (1963)

1) State has affirmative duty to disclose to Def any evidence favorable to the accused, if evidence material either to guilt or punishment

2) Does not depend on good or bad faith of prosecutor

3) Basis is to protect Def's due-process right to fair trial

St v Wayerski
2019 WI 11
385 Wis. 2d 344
Brady v Maryland
83 S. Ct. 1194 (1963)

4) *Wayerski* overrules former *Brady* standards:

   a. Evidence no longer need be in State's exclusive possession or control

b. Now evidence must be disclosed even if available to Def through reasonable diligence

c. Now evidence must be disclosed whether or not an intolerable burden on Def to obtain the information

Britton v St
44 Wis. 2d 109 (1969)

B. Distinction: Discovery versus disclosure

1) Discovery emphasizes Def's right of access to evidence necessary to prepare case; not constitutional

2) Disclosure emphasizes State's duty to disclose exculpatory evidence to Def; constitutional issue decided on case-by-case basis

C. Extent of disclosure required

US v Valenzuela-Bernal
102 S. Ct. 3440 (1982)
Moore v Illinois
92 S. Ct. 2562 (1972)

1) No requirement of complete, detailed account of all investigatory work done, or prosecutor's litigating strategies

St v Wayerski
2019 WI 11
385 Wis. 2d 344

2) Disclosure is required of all evidence helpful to Def

St v Wayerski
2019 WI 11
385 Wis. 2d 344

3) If State is aware that witness has pending prosecution, that must be disclosed

4) No duty to conduct discovery examination for defense

St v Calhoun
67 Wis. 2d 204 (1975)

5) State must disclose, even though prosecutor entertains personal doubt as to whether exculpatory

St v Stanislawski
62 Wis. 2d 730, 746–48 (1974)

6) Scientific proof or expert testimony favorable to Def must be disclosed whether State intends to introduce it

St ex rel Lynch v Cty Ct
82 Wis. 2d 454 (1978)

7) Duty to disclose commences at earliest opportunity, as soon as State recognizes exculpatory character

a. Duty continues and applies to evidence received after disclosure request made

St ex rel Lynch v Cty Ct
82 Wis. 2d 454 (1978)

8) At prelim, in absence of particularized need, defense must rely on prosecutor to identify exculpatory evidence since charge not final

   a. At prelim, request to examine file will be denied, unless showing of particularized need made

US v Bagley
105 S. Ct. 3375 (1985)
Strickland v Washington
104 S. Ct. 2052 (1984)
St v Garrity
161 Wis. 2d 842
(Ct. App. 1991)

D. Duty to disclose exculpatory information—two-part test

1) Test applies whether Def makes no request for exculpatory information, a general request, or a specific request

2) First prong: Evidence must be "favorable to the accused"

US v Agurs
96 S. Ct. 2392 (1976)

   a. Prosecutor must disclose to Def if favorable

   b. Prosecutor may, if doubtful, submit to Ct for in camera inspection by Judge to determine whether exculpatory

   c. State not arbiter of weight, credibility, and exculpatory nature of evidence

US v Bagley
105 S. Ct. 3375 (1985)
St v Garrity
161 Wis. 2d 842
(Ct. App. 1991)

3) Second prong: Evidence must be material either to guilt or to punishment

   a. Must be reasonable probability that result would have been different if evidence had been disclosed to defense

   b. Probability must be sufficient to undermine confidence in outcome

US v Pollack
534 F2d 964
(DC Cir 1976)

4) Evidence must be made available to defense in time to make reasonable use of it

Jones v St
69 Wis. 2d 337 (1975)

Wold v St
57 Wis. 2d 344 (1973)

5) Prosecutor has affirmative duty to acquire all relevant evidence

   a. Includes arrest records from all investigating staff and agencies

   b. Test is whether, with exercise of due diligence, prosecution should have discovered evidence

Giglio v US
92 S. Ct. 763 (1972)
McLemore v St
87 Wis. 2d 739 (1979)
Loveday v St
74 Wis. 2d 503 (1976)

   c. Evidence going to credibility of State's witnesses is exculpatory

Brady v Maryland
83 S. Ct. 1194 (1963)
St v Outlaw
108 Wis. 2d 112, 136
(1982)

   d. State must disclose exculpatory information or testimony, otherwise forgo prosecution

E. Effect of nondisclosure

1) Character of evidence determines whether nondisclosure caused constitutional error

St v Hineman
2023 WI 1
405 Wis. 2d 233

   a. Evidence is material only if reasonable probability that result would have been different had evidence been disclosed

      - "Reasonable probability' is a probability sufficient to undermine confidence in the outcome"

Ruiz v St
75 Wis. 2d 230, 241
(1977)

   b. If evidence creates reasonable doubt that did not otherwise exist (i.e., probative of innocence), new trial required

Ruiz v St
75 Wis. 2d 230, 242
(1977)

      - If evidence would merely give Def a better "sporting chance" of undermining witness's credibility, but would not create reasonable doubt, no new trial

      - If verdict questionable, undisclosed information, even of relatively minor importance, may create reasonable doubt

Tucker v St 84 Wis. 2d 630 (1978)	c. If conviction rests on perjured testimony that prosecutor knew or should have known was perjured and if there is reasonable likelihood that it affected jury's judgment, conviction set aside
St v Randall 197 Wis. 2d 29 (Ct. App. 1995)	d. If other compelling evidence of guilt and no indication that evidence/testimony was tainted, then, harmless error
St v Harris 2004 WI 64 272 Wis. 2d 80	2) If discovered after guilty plea, may be grounds for withdrawal
St v Calhoun 67 Wis. 2d 204 (1975)	3) If evidence discovered during trial, Ct should consider available alternatives to mistrial
Recommendation	a. Alternatives to mistrial should be reviewed and evaluated on record
St v Calhoun 67 Wis. 2d 204, 218 (1975)	b. Penalty for breach of disclosure should fit nature of proffered evidence and remove harmful effect on Def
St v Calhoun 67 Wis. 2d 204, 218 (1975)	c. Alternatives (in order of preference) • Grant recess or continuance to allow Def to investigate or acquire rebutting evidence to eliminate surprise and prejudice to Def • Exclude evidence from use at trial • Grant mistrial
St v Copening 100 Wis. 2d 700 (1981)	d. If mistrial declared • Must have record that establishes relevant and material facts and factors in ruling • Record should reflect what occurred before trial regarding demands as to disclosure, discovery or inspection; compliance by State
St v Hahn 132 Wis. 2d 351 (Ct. App. 1986)	e. Dismissal of case with prejudice appropriate if adequate defense impossible

4) If evidence discovered after trial

St v Hineman
2023 WI 1
405 Wis. 2d 233

a. Evidence must create a reasonable probability of a different result at trial

US v Agurs
96 S. Ct. 2392 (1976)

b. No constitutional violation requiring new trial, unless information creates reasonable doubt that otherwise did not exist

c. Mere possibility that item may have been helpful to defense not enough

6. Preservation of Exculpatory Evidence

Arizona v Youngblood
109 S. Ct. 333 (1988)
California v Trombetta
104 S. Ct. 2528 (1984)
St v Greenwold
189 Wis. 2d 59
(Ct. App. 1994)

A. Prosecution has duty to preserve exculpatory evidence

St v Huggett
2010 WI App 69
324 Wis. 2d 786

1) Based on due-process right to meaningful opportunity to present complete defense

2) Limited to evidence that might be expected to play significant role in defense

St v Oinas
125 Wis. 2d 487
(Ct. App. 1985)

a. Exculpatory value apparent before evidence destroyed

St v Pankow
144 Wis. 2d 23
(Ct. App. 1988)

b. No duty to preserve samples, even if useful to Def, unless Def shows bad-faith destruction by State

St v Munford
2010 WI App 168
330 Wis. 2d 575

c. Def must show that evidence had apparent exculpatory value before its destruction

St v Hahn
132 Wis. 2d 351
(Ct. App. 1986)

3) Evidence of such nature that Def would be unable to obtain comparable evidence by other reasonably available means

St v Holt
128 Wis. 2d 110
(Ct. App. 1985)

4) Additional factors to consider

a. Presence or absence of State's bad faith

b. Timeliness of Def's request for evidence

St v Hahn
132 Wis. 2d 351
(Ct. App. 1986)

B. Sanction within Ct's discretion

1) Dismissal of case with prejudice appropriate if adequate defense would be impossible

California v Trombetta
104 S. Ct. 2528 (1984)

2) Suppression of evidence

7. Postconviction Discovery Issues

St v O'Brien
214 Wis. 2d 328
(Ct. App. 1997)
aff'd, 223 Wis. 2d 303
(1999)

A. To obtain postconviction discovery of physical evidence, Def must show that evidence sought is "consequential" to issue in case

1) "Consequential evidence" is evidence that creates reasonable probability of different trial outcome

St v Parker
2002 WI App 159
256 Wis. 2d 154
St v Noble
2001 WI App 145
246 Wis. 2d 533
rev'd on other grounds
2002 WI 64
253 Wis. 2d 206

B. Def's due-process rights are violated by posttrial destruction of evidence and new trial is required, if evidence destroyed was

1) Apparently exculpatory and of such nature that Def would be unable to obtain comparable evidence by other reasonable means, OR

2) Potentially exculpatory and was destroyed in bad faith

§ 974.07
St v Denny
2017 WI 17
373 Wis. 2d 390

C. Def may move for DNA testing of "relevant" evidence; however, Ct may deny motion if evidence of guilt is overwhelming

CR 11
DEPOSITIONS OF WITNESSES

1. Adult Witnesses .... CR 11-3
2. Child Witness—Audiovisually Recorded Depositions .... CR 11-3
3. Audiovisually Recorded Statements of Children .... CR 11-8
4. Confrontation .... CR 11-8

DEPOSITIONS OF WITNESSES

1. Adult Witnesses

967.04(5)
St v Temby
108 Wis. 2d 521
(Ct. App. 1982)

A. Witness must in fact be unavailable to testify at trial

967.04(5)

B. State must make good-faith effort to obtain presence at trial

967.04(1)

C. Testimony of witness must be competent, relevant, material, and necessary to prevent failure of justice

D. Procedure

967.04(2)

1) Notice to other party

967.04(3), (6), (8)

2) Civil procedure rules on depositions (Ch 804) and statutes governing videotape depositions (§§ 885.44–.47) apply

967.04(4)

3) Def must personally attend; failure to attend is waiver of confrontation right

2. Child Witness—Audiovisually Recorded Depositions

967.04(7)(a)

A. Upon motion of either party and after notice and hearing Ct may order deposition of child witness to be taken by audiovisual means if trial or hearing will commence

1) Before child's 12th birthday, or

2) Before child's 16th birthday, if warranted by interests of justice

St v Thomas
150 Wis. 2d 374 (1989)
St v Street
202 Wis. 2d 533
(Ct. App. 1996)

B. Special audiovisual recording procedure may only be ordered upon finding that particular child under particular circumstances of case requires special procedure as protection from trauma

1) Generalized statutory policies alone not sufficient to support order for audiovisual recording

967.04(7)(b)

C. Factors Ct may consider in determining interests of justice

1) Child's chronological age, level of development, and capacity to comprehend significance of events and to verbalize them

2) Child's general physical and mental health

3) Whether events about which child will testify constituted criminal or antisocial conduct against child or person with whom child has close emotional relationship

   a. If such conduct constitutes physical or sexual assault, its duration and extent of physical or emotional injury caused

4) Child's custodial situation and attitude of other household members to events about which child will testify and to underlying proceeding

5) Child's familial or emotional relationship to Def

6) Child's behavior at or reaction to previous interviews concerning events involved

7) Whether child blames self for events involved or has ever been told by any person not to disclose them

8) Whether child's prior reports of event to associates or authorities have been disbelieved or not acted upon

9) Child's subjective belief regarding consequences to self or persons with whom child has close emotional relationship, to ensue from providing testimony

10) Whether child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders

11) Number of separate investigative and judicial proceedings at which child's testimony may be required, likely length of time until last such proceeding, and mental or emotional strain associated with keeping child's recollection of events witnessed fresh for that period of time

12) Whether use of recorded deposition would reduce mental or emotional strain of testifying and whether deposition could be used to reduce number of times child will be required to testify

967.04(8)

D. Conduct of deposition to be recorded by audiovisual means

1) Ct must preside

885.44–.47

2) Statutes on videotape depositions apply

3) Ct must seek to ensure deposition taken to minimize child's mental and emotional strain and should

a. Schedule deposition on date when child's recollection likely to be fresh and at time of day when child's energy and attention span are greatest

b. Schedule deposition in room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to child's developmental level

c. Order recess whenever energy, comfort, or attention span of child warrants

d. Determine that child understands it is wrong to tell a lie and will testify truthfully if child's developmental level or oral skills such that administration of oath or affirmation in usual form would be inappropriate

e. Before questioning by parties begins, attempt to place child at ease, explain to child purpose of deposition, and identify all persons attending

f. Allow any questioner to have advisor to assist and, upon permission of Judge, to conduct questioning

g. Supervise spatial arrangements of room and location, movement, and deportment of all persons in attendance

h. Allow child to testify while sitting on floor, platform, appropriately sized chair, or lap of trusted adult, or while moving about room within range of visual or audio recording equipment

i. Bar or terminate attendance of any person whose presence not necessary to taking of deposition, or whose behavior disruptive of deposition or unduly stressful to child. Reasonable number of persons deemed by Ct supportive of child or any Def may be considered necessary to taking of deposition

Coy v Iowa
108 SCt 2798 (1988)
St v Thomas
150 Wis. 2d 374 (1989)

4) Ct may employ sight screen between witness and Def only based on finding of particular necessity

St v Street
202 Wis. 2d 533
(Ct. App. 1996)

a. Must make case-specific finding after evidentiary hearing that child would be traumatized by testifying in Def's presence

b. Jury should be instructed not to draw any inferences from presence of screen

5) Ct must seek to ensure that audiovisual record conveys to viewer impressions as nearly identical as possible to those viewer would receive if observing child's testimony in person

885.44
885.47

a. Ct must enforce applicable statutes regarding videotape deposition procedures and playback equipment

b. Objections and rulings must be made as if at trial

967.04(8)(b)9.

6) Ct must seek to ensure that each Def has appropriate and adequate opportunity to cross-examine child and must

a. Permit Def to be in a position from which Def can see and hear child's testimony and can communicate privately and conveniently with counsel

967.04(8)(b)10.

b. Upon request by Def, make appropriate orders for discovery and examination of documents and other evidence in possession of State relevant to issues to be covered at deposition

- At reasonable time before deposition

967.04(8)(a)

E. Custody of and access to audiovisually recorded deposition

1) Certified original recorded deposition kept in secure place by Clerk of Ct

2) Inspected or copied only by Ct order for

885.44(12)

a. Editing

b. Investigation, prosecution, or defense of action for which authorized

c. Provision of services to child

967.04(9)

F. Admission of audiovisually recorded depositions at trial/hearing

1) **May be admitted without additional hearing under § 908.08**

St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

2) **Audiovisually recorded deposition is functional equivalent of live testimony and is not hearsay**

967.04(10)

3) **If recorded deposition admitted, child may not be called as witness at that proceeding except upon showing**

   a. **That additional testimony of child required in interest of fairness for reasons not known and not discoverable with reasonable diligence at time of deposition by party seeking to call child**

3. Audiovisually Recorded Statements of Children

A. See CR 26, Sec. 9.A.

4. Confrontation

A. See CR 26, Sec. 8

CR 12: COMPETENCY TO PROCEED

1. Definitions .... CR 12-1
2. Raising Issue of Competency to Proceed .... CR 12-2
3. Determination of Probable Cause .... CR 12-3
4. Examinations .... CR 12-4
5. Competency Hearing .... CR 12-8
6. Competency Hearing Disposition (For Postconviction, See **Sec. 10**) .... CR 12-10
7. Subsequent Hearings to Reevaluate Def's Competency ...... CR 12-13
8. Discharge from Criminal Commitment .... CR 12-14
9. Transfer to Civil Proceedings .... CR 12-15
10. Postconviction Relief Proceedings .... CR 12-16
11. Probation Revocation Proceeding .... CR 12-18

1. Definitions

§ 971.13(1)

A. Def lacks substantial mental capacity to understand proceedings or assist in defense

St v Leach
122 Wis. 2d 339
(Ct. App. 1984), *rev'd on other grounds,*
124 Wis. 2d 648 (1985)

1) Test of mental capacity is

Godinez v Moran
113 SCt 2680 (1993)
St v Garfoot
207 Wis. 2d 214 (1997)

a. Whether Def has sufficient present ability to consult with Atty with reasonable degree of rational understanding, and

b. Whether Def has rational as well as factual understanding of proceedings

c. At very least, must understand essence of charge, defenses available, and essentials of criminal proceedings

St v Garfoot
207 Wis. 2d 214 (1997)

2) One who is mentally ill or who has an intellectual disability is not necessarily incompetent to stand trial

a. Determination of competence is individualized, fact-specific decision regarding particular individual's mental capabilities

St ex rel Haskins v Dodge Cty Ct
62 Wis. 2d 250 (1974)

3) Incompetency is judicial rather than medical determination

§ 971.13(2)

4) Def not incompetent to proceed solely because medication used to restore or maintain competency

§ 971.13(3)

B. Legal objections to prosecution under § 971.31 may be heard regardless of incompetence, provided

1) Motion susceptible to fair determination before trial

2) Personal participation of Def not required

2. Raising Issue of Competency to Proceed

§ 971.13(1), § 971.14(1r)
St v Smith
2016 WI 23
367 Wis. 2d 483
St v Byrge
2000 WI 101
237 Wis. 2d 197
St v Debra AE
188 Wis. 2d 111 (1994)

A. Sec. 971.14 competency issue can be raised at any stage of criminal proceedings

1) May be raised by Def, Def's Atty, or DA

St v Daniel
2015 WI 44, ¶¶ 27–28
362 Wis. 2d 74

2) MUST be raised by Atty when Atty has reason to doubt competency

St v Meeks
2003 WI 104, ¶¶ 44–46
263 Wis. 2d 794

a. Atty raising issue of competency does not violate Atty-Client privilege and is not required to state reasons or offer Atty's opinions, perceptions, and impressions of client's competency

St v Haskins
139 Wis. 2d 257
(Ct. App. 1987)

b. When Atty has reason to doubt competency of client and fails to raise issue with Trial Ct, Atty's representation deemed deficient

Pate v Robinson
86 SCt 836 (1966)

3) Ct has independent obligation to raise competency issue sua sponte

St v Guck
176 Wis. 2d 845, 851
(1993)

4) Def cannot waive defense of incompetency to stand trial

B. Ct must have reason to doubt Def's competency

St v McKnight
65 Wis. 2d 582 (1974)

1) Basis for doubt must exist beyond Def's own statements

Drope v Missouri
95 SCt 896 (1975)

2) Atty's representation of Def's incompetency is factor, but not conclusive

St v McKnight
65 Wis. 2d 582 (1974)

3) Must be supported by facts giving rise to doubt

971.14(1r)(a)
St v Guck
176 Wis. 2d 845 (1993)

C. Ct shall proceed under § 971.14(1r)(a) whenever there is reason to doubt Def's competency to proceed

3. Determination of Probable Cause

A. Purpose: To avoid unnecessary competency proceedings when charge not supported by probable cause

B. Alternative procedures to establish probable cause

§ 971.14(1r)(b)

1) Conclusive presumption of probable cause exists when competency issue arises after
   a. Def already bound over for trial after prelim, or
   b. Def already found guilty by jury or Ct

§ 971.14(1r)(c)

2) Ct may find probable cause based on complaint, provided
   a. Def does not submit affidavit alleging with particularity that complaint materially false, and
   b. Probable cause finding can be made without evidentiary hearing

§ 971.14(1r)(c)

3) Evidentiary hearing required if Def submits affidavit alleging with particularity that complaint materially false

§ 971.14(1r)(c)

   a. Ct must limit issues and witnesses to those required to determine probable cause

§ 911.01(4)(c)

   b. Rules of evidence do not apply, except Ch 905 privileges

§ 971.14(1r)(c)

   c. Def may cross-examine and call witnesses

d. Standard of proof

- Same standard as probable cause at prelim

St v McKnight 65 Wis. 2d 582 (1974)

- Whether it is probable Def committed crime charged, based on evidence and reasonable inferences

e. Ct's finding must be based on

- The complaint, and
- The evidence presented

§ 971.14(1r)(c)

f. Ct may receive testimony on record by telephone or live AV means

- On showing of good cause

C. Disposition after probable cause determination

1) If probable cause not found

§ 971.14(1r)(c)

a. Ct must dismiss charge without prejudice, or

St ex rel Brockway v Milw Cty Cir Ct 105 Wis. 2d 341 (Ct. App. 1981)

b. Ct may order Def held in custody or bail continued 72 hours pending issuance of new complaint, when

§ 971.31(6)

- Ct dismissed for defect in indictment, information, or complaint, or

§ 971.31(6)

- Ct dismissed for defect in institution of proceedings

2) If probable cause found, Ct to order examination

a. See **Examinations**, **Sec. 4**, *infra*

4. Examinations

RMC Form CR-205

A. Inpatient examinations

§ 971.14(2)(a)

1) Inpatient examination may be ordered only if Ct determines it necessary, and

§ 971.14(2)(b)

a. Def not released on bail, or

b. Def voluntarily cooperates, or

c. Def fails to cooperate in outpatient examination, or

d. Examiner informs Ct that inpatient observation necessary

§ 971.14(2)(a) 2) Ct must appoint one or more examiners

§ 971.14(2)(a) 3) Qualifications of examiner(s)

a. Examiner(s) must have specialized knowledge determined by Ct to be appropriate

b. Examiner(s) need not be physicians

§ 971.14(2)(a) 4) Def may be committed to suitable mental health facility

§ 971.14(2)(d) 5) If Def in custody, sheriff to transport Def to and from examination

§ 971.14(2)(c) 6) Time constraints

a. Examinations must be completed and reports filed within 15 days

b. One 15-day extension allowed, provided

- Examiner or facility requests, and
- Good cause shown

§ 971.14(2)(a) 7) Inpatient examination time establishes sentence credit under § 973.155

RMC Form CR-205 **B. Outpatient examinations**

§ 971.14(2)(a) 1) Ct must appoint one or more examiners

§ 971.14(2)(a) 2) Qualifications of examiner(s)

a. Examiner(s) must have specialized knowledge determined by Ct to be appropriate

b. Examiner(s) need not be physicians

§ 971.14(2)(c) 3) Examination must be completed and reports filed within 30 days

§ 971.14(2)(am)
RMC Form CR-205

C. Examination by DHS

1) If Ct orders Def examined by DHS or DHS facility, DHS must determine
   - a. Where examination to be conducted
   - b. Who will conduct examination
   - c. Whether examination to be conducted on inpatient or outpatient basis

2) Outpatient examination must be conducted in jail or locked unit of facility

3) If inpatient examination necessary, 15-day period for completing examination and filing reports begins on arrival of Def at facility

4) If outpatient examination begun and Dept determines inpatient examination necessary, sheriff must transport Def, unless Def released on bail

D. Examiner's duties

§ 971.14(2)(e) 1) Personally observe and examine Def

Examiners allowed access to Def's past and present treatment records

§ 971.14(3) 2) Submit written report to Ct

E. Contents of examination report

§ 971.14(3)(a) 1) Nature of examination

2) Identification of persons interviewed

3) Description of specific records reviewed

4) Description of any tests administered

§ 971.14(3)(b) 5) Clinical findings of examiner

§ 971.14(3)(c) 6) Examiner's opinion of Def's capacity to understand proceedings and assist in own defense

§ 971.14(3)(d), (5)(a)

7) If Def lacks competency, examiner's opinion of

   a. Likelihood Def's competency will be restored through treatment, and

   b. Likelihood competency will be restored within 12 months or maximum sentence for most serious charge, whichever is less

   c. Whether Def's treatment should occur in inpatient facility designated by DHS, in community-based treatment program under DHS supervision, or in a jail or locked unit of facility that has entered into a voluntary agreement with State to serve as a location for treatment

§ 971.14(3)(dm)

8) Examiner's opinion, if sufficient information available, on

   a. Whether Def needs medication or treatment

   b. Whether Def not competent to refuse medication or treatment

      - Def not competent to refuse medication or treatment if, because of mental disease, developmental disability, alcoholism, or drug dependence, and after advantages and disadvantages of, and alternatives to, accepting medication or treatment have been explained,

        — Def is incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives, OR

        — Def is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to Def's condition in order to make informed choice as to whether to accept or refuse medication or treatment

KS v Winnebago Cty (In re Mental Cond of KS)
147 Wis. 2d 575
(Ct. App. 1988)

   c. Explanation of medically unaccepted and unrecognized alternatives NOT required

§ 971.14(3)(e)

9) Facts and reasoning, in reasonable detail, forming basis of findings and opinions

§ 971.14(4)(a)

F. Ct must distribute copies of report

1) To DA and Def's Atty, or to Def personally if not represented

2) Upon request, to sheriff or jailer where Def held pending trial or sentencing

   a. Sheriff or jailer may provide copy to health-care providers or medical record-keepers at jail

Billy Jo W v Metro (In re Mental Cond of Billy Jo W)
182 Wis. 2d 616 (1994)

3) Ct may not disclose report to others before hearing, but it becomes open record after competency hearing

§ 971.14(2)(g)

G. Def may be examined independently for competency purposes

1) By non-Ct-ordered examiners

2) At any stage of competency proceedings

3) Upon initiative of Def or DA

4) Examiners permitted reasonable access to Def

§ 971.14(2)(f)

H. Def may refuse medication or treatment, unless necessary to prevent physical harm to self or others

5. Competency Hearing

§ 971.14(4)(b)
St v Guck
176 Wis. 2d 845, 851
(1993)

A. Summary hearing and waiver

1) Held upon receipt of Ct-ordered examination reports

2) Ct must promptly determine Def's competence on basis of report if DA, Def, and Def's Atty waive opportunity to present other evidence

St v Guck
176 Wis. 2d 845, 853
(1993)

   a. Def's Atty may waive presentation of evidence on Def's behalf; Atty may not waive presentation counter to Def's wishes

b. Ct should ascertain whether Def saw examination report and was advised of right to challenge its conclusions and cross-examine the evaluator at an evidentiary hearing

Recommendation

c. Personally inquire of Def re: knowledge of right to challenge report's validity and waiver of evidentiary hearing

3) If no waiver, Ct to hold evidentiary hearing

B. Evidentiary hearing

§ 971.14(4)(b)
St v Guck
176 Wis. 2d 845 (1993)

1) At start of hearing, Judge must personally inquire of Def whether Def claims to be competent or incompetent

St v Garfoot
207 Wis. 2d 214 (1997)

a. If Def stands mute or claims to be incompetent, Def to be found incompetent unless State proves by greater weight of credible evidence that Def competent

§ 971.14(4)(b)

b. If Def claims to be competent, Def must be found competent unless State proves by clear and convincing evidence that Def incompetent

St v Daniel
2015 WI 44, ¶ 53
362 Wis. 2d 74

c. If Def claims competency, but Def Atty asserts incompetency, burden is on State to prove competency by a preponderance of the evidence; burden is not on the Def Atty

§ 971.14(4)(b)

d. On approval by Ct for good cause, testimony may be received on record by telephone or live AV means

St v Meeks
2003 WI 104, ¶ 60
263 Wis. 2d 794

e. Atty required to raise issue of competency and does not violate Atty-Client privilege. Prior Atty's testimony regarding opinions, perceptions, or impressions of Def's competency barred by Atty-Client privilege

§ 971.14(4)(b)
St ex rel Matalik v Schubert
57 Wis. 2d 315 (1973)

2) Def has no right to jury determination

3) Def has right to due process, including

a. Notice of hearing

b. Promptly held hearing

c. Representation by Atty

d. Opportunity to introduce evidence contradicting examination reports

e. Sworn testimony

6. Competency Hearing Disposition (For Postconviction, See Sec. 10)

A. If Ct finds Def competent, criminal proceedings resume

§ 971.14(4)(d)

B. If Ct finds Def not competent and NOT LIKELY to become competent within 12 months or maximum sentence specified for most serious offense with which Def is charged, whichever is less

1) Proceedings suspended and Def released, or

Ct may order Def to appear in Ct at specified intervals for redetermination of competency to proceed

§ 971.14(6)(b)

2) Ct may order that Def be taken immediately into custody by law enforcement official and civil commitment or protective placement process begun

See **Transfer to Civil Proceedings, Sec. 9**, *infra*

Comment

3) Statutes do not specify who has burden, and what burden applies, of showing Def likely to become competent

a. Logically, burden should be on State as in initial competency determination

b. Applicable burden may be greater weight of credible evidence because phrase “not likely to become competent” is analogous to “more likely than not”

§ 971.14(5)
RMC Form CR-206

C. If Ct determines Def not competent but LIKELY to become competent within 12 months or maximum sentence specified for most serious offense with which Def is charged, whichever is less

1) Ct to suspend proceedings, AND

2) Ct to commit Def to DHS for DHS to determine whether treatment will occur in an appropriate institution designated by DHS, while under DHS supervision in a community-based treatment program under contract with DHS, or in a jail or locked unit of facility that has entered into voluntary agreement with State to serve as location for treatment

Comment

3) Statutes do not specify who has burden, and what burden applies, of showing Def likely to become competent

   a. Logically, burden should be on State as in initial competency determination

   b. Applicable burden may be greater weight of credible evidence because phrase "likely to become competent" is analogous to "more likely than not"

4) Days spent in commitment deemed days spent in custody under § 973.155

St v Moore
167 Wis. 2d 491 (1992)

   a. Def entitled to sentence credit and good time under § 973.155 for commitment period

   b. State may not confine incompetent person awaiting trial longer than it could a competent person either convicted or found NGI of same offense

St v Green
2022 WI 30
401 Wis. 2d 542

D. Circuit Ct lacks authority to toll the statutory time period to bring Def to competency

E. Involuntary Medication

§ 51.61(1)(g)
Winnebago Cty v Christopher S
2016 WI 1, 366 Wis. 2d 1

1) Def incompetent but likely to be restored has right to refuse medication and treatment

§ 971.14(5)(am)

2) If the Def is not subject to a medication order, DHS may file motion for hearing on Def's competency to refuse medication and treatment

   a. Notice to Def's Atty, Def, and DA

   b. Report on which motion based must accompany motion and notice of motion

c. Report must include statement signed by licensed physician that Def not competent to refuse medication and treatment

  - Based on examination of Def by licensed physician

d. Ct must hold hearing within 10 days after motion filed

  - Hearing may be postponed for up to 20 days after motion filed at request of Def, Def's Atty, or DA

Sell v US
123 SCt 2174, 2184–85 (2003)
St v Fitzgerald
2019 WI 69
387 Wis. 2d 384

3) CAUTION: Sec. 971.14(3)(dm) and (4)(b) are unconstitutional for trial competency purposes unless *Sell* factors below are found by Ct:

a. Important governmental interest at stake (interest in bringing to trial one accused of a serious crime)

b. Involuntary medication will *significantly further* that governmental interest

c. Involuntary medication is necessary to further those interests; any less intrusive treatment is unlikely to achieve substantially the same result

d. Administration of the medication is medically appropriate, i.e., in patient's best interest in light of medical condition

St v Green
2021 WI App 18, ¶¶ 40–51
396 Wis. 2d 658
limited in part on other grounds
2022 WI 30
401 Wis. 2d 542

  - To find *Sell* factors listed at paras. 3)b. and d. above, Ct must be presented with individualized treatment plan as applied to Def. Examiner must review medical history, comorbid medical conditions, and risk factors for side effects

§ 971.14(2)(f)
Sell v US
123 SCt 2174, 2185 (2003)

4) Ct need not apply *Sell* factors if Ct finds forced medication is warranted for a different purpose—namely, person's health is gravely at risk or person is dangerous to self or others

5) Ct must make determination without jury

St v Green
2022 WI 30, ¶ 36 n.13
401 Wis. 2d 542

6) Involuntary medication orders are not subject to an automatic stay pending appeal

St v Guck
176 Wis. 2d 845 (1993)

F. Def cannot waive defense of incompetency to stand trial

7. Subsequent Hearings to Reevaluate Def's Competency

A. Examinations

§ 971.14(5)(b)

1) Def must be reexamined periodically by DHS examiners

§ 971.14(5)(b)

2) Written reports must be submitted to Ct
   a. 3 months after commitment
   b. 6 months after commitment
   c. 9 months after commitment
   d. Within 30 days before expiration of commitment

§ 971.14(5)(b)

3) Reports must include
   a. Whether Def has become competent, or
   b. If Def has not become competent, whether competency likely within remaining commitment period, or
   c. If Def not competent and unlikely to become competent within remaining commitment period, examiner's opinion whether Def suffers
      - Mental illness
      - Alcoholism
      - Drug dependence
      - Developmental disability
      - Other infirmity because of aging or like incapacities

§ 971.14(5)(c)

B. Hold a hearing within 14 days after receipt of report stating Def has regained competency or is not competent and is unlikely to become competent in remaining commitment period

C. Dispositions upon rehearing

§ 971.14(5)(c) 1) If Def found competent
  - a. Def discharged from commitment
  - b. Criminal proceedings resumed
  - § 971.14(5)(d) c. If Def receiving medication to maintain competency, Ct may order continued administration of medication for duration of proceeding

§ 971.14(5)(c) 2) If Def found incompetent, but making sufficient progress to competence
  - a. Commitment ordered to continue

§ 971.14(5)(c) 3) If Def found incompetent and unlikely to become competent within maximum allowed commitment time,
  - a. Continue suspension of proceeding, and
  - b. Release Def
    - Ct may transfer to civil proceedings

D. Relapses into incompetency

§ 971.14(5)(d) 1) Applies when Def regains competency, but again becomes incompetent before conclusion of criminal proceedings

§ 971.14(5)(d) 2) Maximum commitment time
  - a. 18-month cumulative maximum
  - b. Formula for determination
    - 18 months, minus days spent in previous commitments, or
    - 12 months, whichever is less

8. Discharge from Criminal Commitment

§ 971.14(6)(a)

A. After 12 months or maximum sentence for most serious charge, whichever is less

B. Whenever Ct determines Def unlikely to regain competency within maximum allowable commitment time

C. Ct may order Def to reappear in Ct at specified intervals for redetermination of competency

D. Ct may order transfer to civil proceedings

9. Transfer to Civil Proceedings

§ 971.14(6)(b)

A. Ct may order Def committed to

1) Facility specified in § 51.15(2), or

2) Approved public treatment facility under § 51.45(2)(c), or

3) An appropriate medical or protective placement facility

B. Continued detention of Def governed by § 51.15, § 51.45(11), or § 55.135, as appropriate

C. DA may prepare statement that alone will suffice as a petition for commitment or protective placement

1) Based on criminal complaint and evidence in case

2) Filed with Ct

3) Copy sent to director of facility where Def sent

D. Ct may transfer case to branch of Circuit Ct exercising jurisdiction under Ch 51

§ 971.14(6)(b)

E. Days spent in commitment or protective placement do not establish sentence credit

§ 971.14(6)(c)

F. If Def committed under § 51.20 pursuant to petition

1) At least 14 days before expiration of order of commitment or any subsequent consecutive order, Cty Dept to notify

a. Ct that discharged person

b. DA for Cty in which that Ct located, and

        c. Person's Atty in prior criminal proceeding

        d. Unless Cty Dept or DHS has applied for extension

§ 971.14(6)(d)

    2) Atty who has received notice or has otherwise learned that Def may have become competent, may move Ct to order that Def undergo a competency examination

        a. If Ct orders competency examination, report must be filed and competency hearing held

Billy Jo W v Metro
(In re Mental Cond of Billy Jo W)
182 Wis. 2d 616 (1994)

        b. If Ct determines Def is competent, criminal proceeding to be resumed

        c. If Ct determines Def not competent, Ct must release Def but may impose such reasonable nonmonetary conditions as will protect public and enable Ct and DA to discover whether person subsequently becomes competent

§ 971.14(6)(d)
St v Carey
2004 WI App 83
272 Wis. 2d 697

G. DA or Def's Atty may move Ct for redetermination of competency

H. See Probate Benchbook, MH 1, for full discussion of involuntary commitments

10. Postconviction Relief Proceedings

St v Debra AE
188 Wis. 2d 111 (1994)
See also St v Smith
2016 WI 23
367 Wis. 2d 483

A. Competency should be determined by Ct when it has reason to believe Def is

1) Unable to assist counsel; or
2) Unable to make decisions with reasonable degree of rational understanding

B. May be raised by State, Def's counsel or Ct sua sponte

C. Method of evaluation left to Ct's discretion

Sec. 971.14 does not apply post-sentencing

D. If hearing necessary, Ct should be "guided" by § 971.14(4) as much as possible

1) Ct grants motion to determine competency, or orders competency evaluation sua sponte, if has reason to doubt Def's competency based on

   a. Motion, setting forth grounds of belief that Def incompetent

   b. Evidence presented in proceedings

   c. Def's colloquies with Ct

   d. Def's courtroom demeanor

2) Upon finding "reason to doubt," Ct determines method for evaluating competency. Method left to Ct's discretion, including

   a. Reliance on counsel's affidavit, stipulation, or Ct's own observations

   b. Ordering examination of Def by person with specialized knowledge

   c. Upon hearing, guided by § 971.14(4) to extent feasible

3) Burden of proof:

St v Debra AE
188 Wis. 2d 111, 132
(1994)

   a. Should be guided by § 971.14(4) to the extent possible

St v Daniel
2015 WI 44, ¶ 53
362 Wis. 2d 74

   b. If Def claims competency, but Def Atty asserts incompetency, burden is on State to prove competency by a preponderance of the evidence; burden is not on the Def Atty

E. If Def found incompetent, Ct should consider

1) Continuation of postconviction proceedings

§ 809.82(2)

2) Continuances or enlargement of time limits

§ 54.50

3) Appointment of temporary guardian

4) Expanding basis for raising issues at later proceeding after competency regained

St v Scott
2018 WI 74, ¶¶ 24–26
382 Wis. 2d 476,
limited on other grounds
by St v Green
2022 WI 30
401 Wis. 2d 542
St v Debra AE
188 Wis. 2d 111, 119
(1974)

5) Involuntary medication order only after *Debra AE* factors resolved

St ex rel Vanderbeke
v Endicott
210 Wis. 2d 502 (1997)

11. Probation Revocation Proceeding

A. Probationer has due-process right to competency determination when ALJ has reason to doubt probationer's competency during probation revocation proceedings

B. When ALJ has reason to doubt probationer's competence to proceed, Circuit Ct in Cty in which probationer was sentenced should make competency determination

1) Probation revocation proceeding and all applicable time limits stayed until competency proceeding held and determination made

2) If probationer in physical custody, custody continues to extent consistent with § 971.14

C. Competency proceeding should adhere to §§ 971.13 and 971.14 to extent practicable

D. Habeas may be used to return issue to Circuit Ct for review

CR 13
TAKING A PLEA

1. Procedure for Taking a Plea .... CR 13-3
2. Vacating Plea After Acceptance.......................... CR 13-15
3. Effects of Pleas.. CR 13-15
4. General Rule: Guilty, No Contest, and *Alford* Pleas Waive All Nonjurisdictional Defects.. CR 13-18

Larson v St
60 Wis. 2d 768 (1973)
Wis JI-Cr SM-32

1. Procedure for Taking a Plea

967.08
971.04(1)(g)
St v Soto
2012 WI 93, ¶¶ 46–48
343 Wis. 2d 43
St v Anderson
2017 WI App 17, ¶¶ 34, 42, 374 Wis. 2d 372
See ch CR 4

A. Def present in person in Ct unless:

1) Video or other means available in Ct enable Def to participate as if in courtroom

2) Def voluntarily, intelligently, and knowingly consents

3) If Def appears by telephone or live audiovisual means, record must show

   a. Def informed unambiguously of right to be present in person

   b. Ct inquires as often as necessary whether Def can see/hear and understand Ct and others

971.095(2)

B. Ct to inquire whether DA has complied with consultation requirement of victims' rights law

C. Felony

1) Must have written information

   a. Recess initial appearance to give DA opportunity to prepare and file written information before plea made

971.01(2)
St v Woehrer
83 Wis. 2d 696 (1978)

b. Prosecutor has 30 days after bindover to file information or Ct loses personal jurisdiction

- Prosecutor may move Ct for order extending time for filing for cause

D. Plea Agreement

1) Prosecution states agreement and defense Atty and Def affirm correctness of plea agreement

Broadie v St
68 Wis. 2d 420, 423–24
(1975)

2) When plea is result of bargain, Ct need not go to same length to determine factual basis to sustain charge as with non-negotiated plea

St v Briggs
218 Wis. 2d 61
(Ct. App. 1998)

a. Ct must determine whether charge is legally cognizable

3) Ct may reject plea agreement that does not serve public interest

St v Conger
2010 WI 56, ¶ 48
325 Wis. 2d 664
St v Kenyon
85 Wis. 2d 36 (1978)
St v Lloyd
104 Wis. 2d 49
(Ct. App. 1981)

a. Prosecutor's motion to dismiss or amend charges as part of bargain subject to Ct review and may be rejected if not in public interest

St v Conger
2010 WI 56
325 Wis. 2d 664

- Law enforcement's view of proposed plea may be appropriate factor

St v Conger
2010 WI 56
325 Wis. 2d 664

- Ct may consider other *Conger* factors

Grant v St
73 Wis. 2d 441 (1976)

b. Plea agreements whereby relevant information concealed from Ct are against public policy

967.055
St v Corvino
2016 WI App 52, ¶ 24
370 Wis. 2d 681

c. Specific findings must be made in OWI cases

4) Parties cannot enter conditional guilty pleas to preserve appellate review of an otherwise waived issue

St v Beyer
2021 WI 59, ¶ 29
397 Wis. 2d 616

Parties may stipulate to facts for purposes of a trial but cannot stipulate to a finding of guilt

St v McQuay
154 Wis. 2d 116 (1990)
St v Williams
2003 WI App 116
265 Wis. 2d 229

5) Judge cannot participate in plea negotiations

a. Ct is neither party to nor bound by plea agreement

St v Williams
2000 WI 78
236 Wis. 2d 293
St v Betts
129 Wis. 2d 1 (1986)
St v Marinez
2008 WI App 105
313 Wis. 2d 490

- Ct need not (but may) advise Def it will not follow sentencing recommendation

St v McQuay
154 Wis. 2d 116 (1990)

- Ct has affirmative duty to inform Def that Ct is not bound by plea agreement

6) Involves prosecutor, Def, and Def's Atty *only*

St v McQuay
154 Wis. 2d 116 (1990)

a. Probation or parole agents, law enforcement officials not bound by or party to agreement

St v Lee
88 Wis. 2d 239 (1979)

7) Agreement must be placed on record

St v Williams
2002 WI 1, ¶ 5
249 Wis. 2d 492
St v Reed
2013 WI App 132, ¶ 6
351 Wis. 2d 517

8) Plea agreements may be vacated based on a material and substantial breach

St v Reed
2013 WI App 132, ¶ 12
351 Wis. 2d 517

a. Remedy is in Circuit Ct's discretion

St v Reed
2013 WI App 132, ¶7
351 Wis. 2d 517

b. Not every breach requires a remedy. Nonbreaching party may be entitled to relief if breach deprives that party of a material and substantial benefit for which the party bargained

St v Brown
2006 WI 100
293 Wis. 2d 594
Ernst v St
43 Wis. 2d 661 (1969)

E. Record must affirmatively show that Trial Judge personally addressed Def and determined that

St v Schmidt
2021 WI 65, ¶ 18
397 Wis. 2d 758
Ernst v St
43 Wis. 2d 661 (1969)

1) Plea was voluntary

St v Hoppe
2009 WI 41
317 Wis. 2d 161
St v Moederndorfer
141 Wis. 2d 823
(Ct. App. 1987)

a. Can use waiver of rights form, as long as record affirmatively shows that Def read and discussed form with counsel and understood each right waived

St v Pegeese
2019 WI 60, ¶¶ 33, 36
387 Wis. 2d 119
RMC Form CR-227

b. Even with use of written form, a minimal personal colloquy needed

Rahhal v St
52 Wis. 2d 144 (1971)

2) Plea not involuntary merely because induced or motivated by desire to obtain lesser penalty, if Def has reasonable alternative, such as going to trial

St v Dawson
2004 WI App 173
276 Wis. 2d 418

3) Plea is involuntary if induced by promise that cannot be kept, e.g., to reopen and amend

St ex rel White v Gray
57 Wis. 2d 17 (1973)

4) Bargain involving concession to another person (especially sibling or loved one) bears close scrutiny for voluntariness because of potential psychological pressure in situation

a. Also review to determine whether such plea is in public interest before accepting plea agreement

St v Hunter
2005 WI App 5
278 Wis. 2d 419
St v Williams
2003 WI App 116, ¶ 11
265 Wis. 2d 229

5) Judicial participation in plea negotiation destroys plea's voluntariness

St v Dillard
2014 WI 123, ¶ 69
358 Wis. 2d 543
St v Howell
2007 WI 75, ¶ 37
301 Wis. 2d 350
St v Lackershire
2007 WI 74
301 Wis. 2d 418
St v Bangert
131 Wis. 2d 246 (1986)

6) Def understood charge and its consequences

a. Trial Judge must determine Def's understanding of nature of charge at plea hearing by any of following

St v Hendricks
2018 WI 15, ¶¶ 19, 33
379 Wis. 2d 549
St v Brown
2012 WI App 139
345 Wis. 2d 333

- Summarize elements of the offense, including party to a crime, if appropriate
- Ask Def's Atty whether Atty explained nature of charge to Def and ask Atty to summarize extent of explanation, including reiteration of elements
- Refer to record or other evidence of Def's knowledge, established before plea hearing, of nature of charge

St v Finley
2016 WI 63
370 Wis. 2d 402
St v Taylor
2013 WI 34,¶ 8
347 Wis. 2d 30

b. Def must be informed of maximum penalty and range of punishments, including penalty enhancers, that can be imposed

St v Muldrow
2018 WI 52, ¶ 8
381 Wis. 2d 492

- GPS monitoring is not a punishment

St v Williams
2018 WI 59, ¶ 43
381 Wis. 2d 661

- DNA surcharge is not a punishment

St v Schmidt
2021 WI 65
397 Wis. 2d 758

- Child pornography surcharge is not a punishment

c. Defense counsel may not speak for Def; Def must affirmatively state own knowledge and understanding of charge

St v Lackershire
2005 WI App 265,
¶¶ 14–15 & n6,
288 Wis. 2d 609
rev'd on other grounds
2007 WI 74
301 Wis. 2d 418
St v Parker
2001 WI App 111
244 Wis. 2d 145

d. Def's knowledge of collateral consequences not required, e.g., transfer to an out-of-state prison, or actual knowledge or comprehension of read-ins

973.176(2)

e. Ct must inform Def in writing of voting ineligibility if sentenced on felony charge

Form DOC 2352/
RMC Form CR-218

- Ct shall use form designed by DOC under § 301.03(3a) to inform Def

St v Howell
2007 WI 75, ¶ 56
301 Wis. 2d 350
St v Lackershire
2007 WI 74, ¶ 33
301 Wis. 2d 418

7) Sufficient factual basis for the plea exists

St v Bangert
131 Wis. 2d 246 (1986)
St v Minniecheske
127 Wis. 2d 234 (1985)
Wis JI-Cr SM-32

8) Def knowingly waived constitutional rights

a. Right to jury trial and unanimous verdict

b. Right to proof beyond a reasonable doubt

c. Right to confront witnesses

d. Right to remain silent and not incriminate self

e. Right to call witnesses and use compulsory process

St v Shegrud
131 Wis. 2d 133 (1986)
St v Duychak
133 Wis. 2d 307
(Ct. App. 1986)

9) These rules also apply when Def enters plea of not guilty by reason of mental disease or defect (NGI)

   a. Def pleading not guilty by reason of mental disease or defect admits, as matter of law, that but for lack of mental capacity, Def committed essential elements of crime

   b. *Bangert* applies when Def chooses not to contest first phase of bifurcated trial

St v Francis
2005 WI App 161
285 Wis. 2d 451

10) Withdrawal of NGI plea is not a waiver of constitutional right and does not require colloquy

971.08(1)(c), (2)
St v Fuerte
2017 WI 104, ¶ 19
378 Wis. 2d 504

11) Warning must be given personally at plea hearing using the statutory language; a *verbatim* reading is strongly preferred: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law"

   a. Must be done at plea hearing

971.06(3)
St v Baeza
174 Wis. 2d 118
(Ct. App. 1993)
St v Chavez
175 Wis. 2d 366
(Ct. App. 1993)

   b. At the time of plea, Ct may not require Def to disclose citizenship status

Lee v US
137 SCt 1958, 1968
(2017)
Padilla v Kentucky
130 SCt 1473, 1486
(2010)
St v Shata
2015 WI 74
364 Wis. 2d 63
St v Ortiz-Mondragon
2015 WI 73
364 Wis. 2d 1

   c. Recommendation: Ensure trial counsel advises Def if plea carries immigration consequences

St v Stockland
2003 WI App 177
266 Wis. 2d 549

12) Delivering rights to several Defs en masse is approved—typical in high-volume traffic and misdemeanor Cts—efficient and effective

F. Areas of inquiry of Def by Ct

St v Bangert
131 Wis. 2d 246 (1986)
St v Carter
131 Wis. 2d 69 (1986)

1) Intentional failure on part of Trial Judge to follow mandatory dictates of *Bangert* could be ground for judicial discipline

St v Hoppe
2009 WI 41, ¶ 18
317 Wis. 2d 161

2) Does Def understand following

a. Def does not have to enter into plea agreement; it is Def's own choice

St v Roou
2007 WI App 193
305 Wis. 2d 164

b. Elements of offense

- Have Def read information (complaint) pointing out elements of offense (including alleged prior convictions under repeater allegation, if any)

c. Power of Ct to sentence Def to presumptive minimum and maximum penalties, regardless of plea agreement

d. If plea accepted, Def will be found guilty of this offense

St v Straszkowski
2008 WI 65,
¶¶ 5–6, 92–94
310 Wis. 2d 259

e. For read-in offenses:

- Ct may consider read-in charges when imposing sentence
- Maximum penalty is not increased
- Def may be required to pay restitution on read-ins

- State is prohibited from future prosecution of read-ins

St v Frey
2012 WI 99
343 Wis. 2d 358

f. Charges dismissed, but not read in, may be considered at sentencing. Ct must determine what effect parties intend the dismissed charge to have on the plea. Ct must not use phrase "dismissed outright"

3) Determine that plea has not been induced by promises (other than plea agreement), threats, or force

St v Hampton
2004 WI 107
274 Wis. 2d 379

4) Ct must **personally** inform Def that Ct is not bound by plea agreement or recommendation of the State

5) Determine whether Def talked to DA or other officer about this case

   a. Has Def made any written statements?

      - Inquire into legality of those statements

   b. Would Def be pleading guilty if Def had not talked or made written statements about case?

6) Determine whether Def understands constitutional rights and waiver of rights

   a. To a jury trial and unanimous verdict

   b. To hear testimony of witnesses and to cross-examine and confront them at trial with help of Atty

   c. To call own witnesses at trial and to use subpoenas

St v Wilson
179 Wis. 2d 660
(Ct. App. 1993)

   d. To give own testimony or to remain silent

e. To require the State to prove that Def committed each "element" of crime charged beyond a reasonable doubt

f. Def could not be convicted if State fails its burden of proof

7) Determine whether Def has had enough time to consult with Atty

8) Determine whether or not the Def has any questions of Ct or Def's attorney

   a. Ct may grant recess, if necessary

9) Give appropriate warnings

973.176(1)

   a. Possession of firearms and potential charges for felony conviction

      - Recommended at plea
      - Required at sentencing

10) Inquire into Def's educational background, literacy, and ability to understand, such as mental or emotional or alcoholic and chemical disability issues

   a. About rights being given up

   b. About plea agreement

11) Reconfirm desire to enter plea after receiving all of the information

12) Inquire into voluntariness and intellectual understanding

St v Hoppe
2009 WI 41, ¶¶ 30–32
317 Wis. 2d 161

13) Use of waiver of rights/plea questionnaire eliminates need for much of above oral inquiry but is not a complete substitute for an in-Ct colloquy

St v Bonds
161 Wis. 2d 605
(Ct. App.),
rev'd on other grounds,
165 Wis. 2d 27 (1991)

G. Ct must then be provided with factual basis for plea that has been entered

971.08(1)(b)
St v Howell
2007 WI 75
301 Wis. 2d 350
St v Lackershire
2007 WI 74
301 Wis. 2d 418

1) Ct must be satisfied that Def in fact committed crime charged

St v Thomas
2000 WI 13
232 Wis. 2d 714

2) Precise manner in which Ct satisfied left to discretion of Ct

3) Possible methods

   a. Inquiry of prosecutor

   b. Inquiry of Def

St v Smith
189 Wis. 2d 496 (1995)
St v Harrell
182 Wis. 2d 408
(Ct. App. 1994)

   c. If plea is to an amended charge, make certain facts admitted support amended charge. Do not rely on facts in original complaint

971.08(1)(b)

   d. Require Def to admit elements of offense

St v Black
2001 WI 31
242 Wis. 2d 126

   e. Stipulations of counsel that State would prove facts alleged on face of complaint, if case went to trial

St v Duychak
133 Wis. 2d 307
(Ct. App. 1986)

   f. Documentary evidence such as police reports or transcript of prelim

St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)

   g. Testimony from police officer, victims, or other witnesses

4) Inform Def that Def not required to answer—but does Def agree or disagree with facts presented by State?

973.12
St v Rachwal
159 Wis. 2d 494 (1991)
St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)
St v Zimmerman
185 Wis. 2d 549
(Ct. App. 1994)

H. If repeater alleged, must be proved or admitted

St v Flowers
221 Wis. 2d 20
(Ct. App. 1998)

1) Certified judgment of conviction attached to charging document is sufficient

939.62(2m)
St v Collins
2002 WI App 177, ¶ 11
256 Wis. 2d 697

a. Persistent repeater: to be subject to life imprisonment without parole or extended supervision, Def's admission of validity is sufficient, EXCEPT

939.62(2m)(d)
St v Collins
2002 WI App 177
¶¶ 12–14,
256 Wis. 2d 697

b. When based on out-of-state conviction, admissions are insufficient; Trial Ct must make independent determination beyond a reasonable doubt that out-of-state conviction is comparable to Wisconsin serious felony

Recommendation

2) Ct should inquire personally whether Def admits to facts supporting repeater allegations

973.12, 939.62(2m),
939.618
St v Rachwal
159 Wis. 2d 494 (1991)
St v Coolidge
173 Wis. 2d 783
(Ct. App. 1993)

I. Ct must be satisfied that Def committed the crime and/or any other special conditions and make a finding of such. Special conditions include repeater allegations, number of prior convictions, enhancer allegations, and *Alford* plea circumstances

972.15(1)

J. Order preparation of PSI, if one to be made (in discretion of Ct)

1) Ct may not order DOC to prepare PSI on misdemeanor

971.08(1)(d)

K. Ct must inquire whether DA complied with consultation requirement of victims' rights statute, § 971.095(2)

972.14

L. If proceeding to sentencing immediately:

1) Ask DA, Def's Atty, and Def whether they have anything to say relevant to sentencing

2) Def has constitutional right to allocution

972.14(2)

3) Ask whether there is any reason why sentence should not be pronounced

4) Pronounce sentence

972.13
RMC Form CR-204

M. Have written judgment of conviction executed and filed

1) Signed by Judge or clerk

2. Vacating Plea After Acceptance

St v Comstock
168 Wis. 2d 915 (1992)

A. Ct may vacate guilty or no contest plea sua sponte only when it finds that there was fraud in procuring plea or that party intentionally withheld from Ct information that would have induced Ct not to accept plea

B. *See* CR 43, Withdrawal of Plea

3. Effects of Pleas

A. Plea of guilty

St ex rel Skinkis v Treffert
90 Wis. 2d 528
(Ct. App. 1979)

1) Ordinary legal effect of guilty plea is to admit facts charged, but not the crime

St v Johnson
105 Wis. 2d 657, 663
(Ct. App. 1981)

a. Factual basis of Def's conduct must be shown by prosecutor's summary of evidence that State would offer at trial

b. Def does not admit charged crime

US v Broce
109 SCt 757 (1989)
St v Pohlhammer
82 Wis. 2d 1 (1978)

2) When Def admits guilt of charged offense in fact, in open Ct, Def may attack only voluntary and intelligent character of guilty plea

B. No contest/nolo contendere plea

St v Robinson
2002 WI 9
249 Wis. 2d 553
Lee v
Bd of Dental Exam'rs
29 Wis. 2d 330, 333–34
(1966)

1) When accepted by Ct, plea constitutes implied confession (admission) for purpose of case to support conviction and "in that respect is equivalent to a plea of guilty." Guilty plea is unqualified admission and can be used in collateral matters; no contest/nolo contendere plea is qualified admission applying only to the case and cannot be used collaterally

C. *Alford* no contest or *Alford* guilty plea

St v Nash
2020 WI 85, ¶ 34
394 Wis. 2d 238
St v Multaler
2002 WI 35
252 Wis. 2d 54

1) Ct may accept no contest plea or guilty plea accompanied by claim of innocence

St v Smith
202 Wis. 2d 21 (1996)

a. Ct must determine that prosecutor's summary of evidence that State would offer at trial is strong proof of guilt

St v Nash
2020 WI 85, ¶¶ 35–39
394 Wis. 2d 238
St v Smith
202 Wis. 2d 21 (1996)

b. Strong proof/evidence of guilt and factual basis for each element of charge must exist even in negotiated plea, determined on a case-by-case analysis in the reasonable discretion of the Ct

St v Spears
147 Wis. 2d 429
(Ct. App. 1988)

- Factual basis of plea need not be established beyond a reasonable doubt

- Must include facts substantially negating Def's claim of innocence
- All exculpatory inferences need not be negated, but inculpatory inference must be reasonably drawn from facts shown

North Carolina v Alford
91 SCt 160 (1970)
St v Johnson
105 Wis. 2d 657, 663
(Ct. App. 1981)

- Acknowledgment of truth of all facts essential to guilt not necessary to satisfy factual basis requirement

See Ernst v St
43 Wis. 2d 661 (1969)

c. An *Alford*-type plea is acceptable and does not violate *Ernst* requirement that Def admit guilt

North Carolina v Alford
91 SCt 160 (1970)
St v Johnson
105 Wis. 2d 657
(Ct. App. 1981)

2) Def has right to enter *Alford* plea for strategic reasons, even though guilt not acknowledged

St v Smith
202 Wis. 2d 21 (1996)
Wis JI-Cr SM-32A

3) Ct should take greater pains than for non-*Alford* plea to be sure record reflects adequate factual basis for *Alford* plea

St v Salentine
206 Wis. 2d 419
(Ct. App. 1996)

4) It must be clear Def fully understands charge and effect of *Alford* plea

971.31(10)
St v Riekkoff
112 Wis. 2d 119 (1983)
St v Olson
127 Wis. 2d 412
(Ct. App. 1985)

D. Conditional pleas with right to appeal adverse pretrial rulings not allowed except

1) For challenges to orders denying motions to suppress evidence, or

2) For challenge to admissibility of a statement

Note: Sec. 971.31(10) exceptions apply even if Def has pleaded guilty.

St v Kelty
2006 WI 101, ¶¶ 18, 52
294 Wis. 2d 62

4. General Rule: Guilty, No Contest, and *Alford* Pleas Waive All Nonjurisdictional Defects

A. Waived defects include constitutional claims

B. Rule is one of administration and does not involve power to address the issues raised

C. Double jeopardy waived unless violation is apparent from the record

CR 14
SUBSTITUTION OF JUDGE/RECUSAL

1. Substitution of Prelim Judge .... CR 14-3
2. Substitution of Trial Judge .... CR 14-4
3. Sua Sponte Recusal by Judge .... CR 14-9
4. Recusal for Prejudice .... CR 14-11

971.20(2)	**1. Substitution of Prelim Judge**
971.20(3)(a)	**A. "Judge" includes Ct Comm'r**
St v Holmes 106 Wis. 2d 31, 34 (1982)	**B. No cause necessary for substitution**
Sprang v St 63 Wis. 2d 679 (1974)	1) Def need not allege or demonstrate actual prejudice
	C. Time and procedure for filing request
971.20(3)(b)	1) Def may file written request with Ct at initial appearance, or
971.20(3)(b)	2) Def may file written request with Clerk of Ct at least five days before prelim, unless Ct otherwise permits
	D. Limitations
971.20(3)(b)	1) Substitution of prelim Judge exhausts Def's right to substitution for duration of action
	a. Except under § 971.20(7), allowing one additional substitution after appeal
	2) Request for substitution may not name more than one Judge
St v Smith 106 Wis. 2d 17, 20 (1982)	3) Named Judge may not be assigned to other proceedings in same case once substituted

2. Substitution of Trial Judge

971.20(2)
In re Rules of Crim Procedure: § 971.20, Stats,
110 Wis. 2d 242 (1983)
St v Holmes
106 Wis. 2d 31, 34 (1982)

A. No cause necessary for substitution

Sprang v St
63 Wis. 2d 679, 682–83 (1974)
St v Garner
54 Wis. 2d 100, 102–03 (1972)

1) Def need not allege or demonstrate actual prejudice

B. Time for filing request

971.20(4)

1) Def or Def's Atty must file request before making any motions and before arraignment

St ex rel Mace v Cir Ct
193 Wis. 2d 208 (1995)

a. Judge is not Trial Judge until after bindover

2) If new Judge assigned and Def has not exercised right to substitution

971.20(5)
St v Damaske
212 Wis. 2d 169 (Ct. App. 1997)
St ex rel Strong v Cir Ct
184 Wis. 2d 223 (Ct. App. 1994)

a. When new Judge assigned at least 20 days before trial, Def must file written request within 15 days after actual notice of assignment

971.20(5)

b. When new Judge assigned within 20 days before trial, Def must file written request within 48 hours after actual notice

971.20(5)

c. When new Judge assigned within 48 hours before trial, Def must make oral or written request before commencement of trial

St v Norwood
2005 WI App 218
287 Wis. 2d 679

d. Request must be filed before proceedings continue before newly assigned Judge

St v Wisth
2009 WI App 53
317 Wis. 2d 719

e. No right to substitution in postconviction proceedings

St v Bohannon
2013 WI App 87,
¶¶ 17–26,
349 Wis. 2d 368

3) Def who did not request substitution of Judge originally assigned, nor of Judge who replaced originally assigned Judge, does not have a renewed right to substitute when original Judge is reassigned to the case

4) Exceptions to filing deadline

St ex rel Tessmer v Cir Ct
123 Wis. 2d 439
(Ct. App. 1985)

a. Substitution request filed after arraignment but before Def or Def's Atty learns Trial Judge's identity not untimely so long as no unreasonable delay

St ex rel Tinti v Cir Ct
159 Wis. 2d 783
(Ct. App. 1990)

b. If intake system does not provide adequate formal notice in advance of arraignment of assignment of Trial Judge, statutory time limits for substitution must be extended

- Must allow Def intelligent opportunity to exercise right of substitution

St v Zimbal
2017 WI 59, ¶ 52
375 Wis. 2d 643

c. Strict compliance with 20-day deadline after remittitur is not required and request for substitution is timely if Def follows Judge's instruction not to file until Atty is appointed

C. Waiver of request for substitution

1) Failure to request substitution within time limits waives right to substitution of Judge

St v Hollingsworth
160 Wis. 2d 883
(Ct. App. 1991)

2) If Ct denies timely substitution request, further participation in pretrial proceedings waives right of substitution

St v Harrison
2015 WI 5
360 Wis. 2d 246

3) Once substitution is granted, doctrines of waiver and forfeiture no longer apply, even if case inadvertently reassigned to substituted Judge and Def does not object

D. Procedure

971.20(4)

1) Written request required, except

971.20(5)

   a. When new Judge assigned within 48 hours before trial, Def may make oral request

971.20(4)

2) Request must be filed with Clerk of Ct

971.20(8)

   a. Clerk to immediately contact named Judge for determination of whether request timely and in proper form

971.20(8)

   b. If no determination made within 7 days, clerk must forward request to Chief Judge of Judicial Administrative District for action

E. Judicial obligations

971.20(8)

1) Named Judge must determine whether request timely and in proper form

Sprang v St
63 Wis. 2d 679, 683
(1974)
Baldwin v St
62 Wis. 2d 521 (1974)

2) Request may be denied if not filed in proper and timely manner

St ex rel James LJ v
Cir Ct for Walworth Cty
200 Wis. 2d 496 (1996)

   a. Denial is reviewable by Chief Judge in District and Ct of Appeals

Barbara RK v James G
(Paternity of
Danielle LG)
2002 WI App 47
250 Wis. 2d 667

- Failure to seek review by Chief Judge will prevent appellate relief

3) If request timely and in proper form

971.20(9)

a. Named Judge has no authority to act further in case, except

- To conduct initial appearance
- To accept plea
- To set bail

971.20(8)

b. Clerk of Ct must request assignment of new Judge under § 751.03

751.03(3)

c. Assignment of new Judge made by Chief Judge of Judicial Administrative District

St v Smith
106 Wis. 2d 17, 20 (1982)

4) Named Judge may not be assigned to other proceedings in same case once substituted

St v Austin
171 Wis. 2d 251
(Ct. App. 1992)

a. Absent written agreement of all parties

St v Tappa
2002 WI App 303
259 Wis. 2d 402

5) No obligation to advise Def that Judge was victim of similar crime previously

F. Limitations

971.20(2), (7)

1) Def has right to only one substitution of Judge, except under § 971.20(7) allowing one additional substitution if Appellate Ct orders new trial or sentencing proceeding

St v Foley
153 Wis. 2d 748
(Ct. App. 1989)

a. No right of substitution when remand for new restitution hearing as condition of probation, because probation not a "sentence"

971.20(2)	2) Request for substitution may not name more than one Judge
St v Beaty 57 Wis. 2d 531 (1973)	3) Judge may properly deny untimely request for substitution
	4) Multiple Def actions
971.20(6)	a. Only one substitution request available
971.20(6)–Judicial Council Note, 1981	b. All Defs must join in single request
St ex rel Garibay v Kenosha Cty Circuit Ct 2002 WI App 164 256 Wis. 2d 438	• Applies to Defs not yet before the Ct

G. Reinstatement of Judge

971.20(11)	1) Substituted Judge may be reinstated upon filing of agreement signed by all parties, substituted Judge, and new Judge
971.20(11) *St v Austin* 171 Wis. 2d 251 (Ct. App. 1992)	2) The action and all records must be transferred back to substituted Judge

H. Substitution following appeal

971.20(7) *Rohl v St* 97 Wis. 2d 514 (1980)	1) Request must be filed within 20 days after filing of remittitur in Trial Ct
	2) If Def previously filed substitution request, additional request may be filed if Appellate Ct has ordered new trial or sentencing proceeding
St v Foley 153 Wis. 2d 748 (Ct. App. 1989)	a. New restitution hearing as condition of probation not part of sentencing proceeding

3. Sua Sponte Recusal by Judge

757.19(2)
SCR 60.04(4)
St v Asfoor
75 Wis. 2d 411,
436 (1977)

A. Grounds for mandatory recusal

757.19(2)(a)

1) Related to party, Atty, or spouse of either within third degree of kinship

St v Harrell
199 Wis. 2d 654 (1996)

   a. If Judge's relative is government counsel, restriction applies only to Atty of record or any other Atty who participates in case

757.19(2)(b)
ABA Stds—Special Functions of Trial Judge
§ 6-1.9 (2000)

2) Judge is party or material witness

   a. Unless Judge determines pleading purporting to make Judge a party is false

757.19(2)(c)
Sturdevant v St
49 Wis. 2d 142,
145 (1970)

3) Judge has previously acted as Atty for party in same action now pending before Ct

757.19(2)(d)

4) Judge prepared, as Atty, any legal instrument whose validity or construction at issue

757.19(2)(e)

5) Appellate Judge has previously handled matter while Judge of lower Ct

757.19(2)(f)

6) Judge has significant financial or personal interest in outcome

757.19(2)(f)

   a. Interest does not occur solely by Judge being member of political or taxing body that is party

757.19(2)(g)
St v Walberg
109 Wis. 2d 96,
105 (1982)

7) Judge determines for any reason Judge cannot, or it appears Judge cannot, act impartially

St v Jones
181 Wis. 2d 194
(Ct. App. 1993)

   a. Highly discretionary ground, which should be used with restraint

St v Harrell
199 Wis. 2d 654 (1996)
St v American TV & Appliance
151 Wis. 2d 175,
183–84 (1989)
St v Santana
220 Wis. 2d 674
(Ct. App. 1998)

   b. Judge's subjective determination: what exists in Judge's mind

Aetna Life Ins Co v Lavoie
106 SCt 1580,
1587 (1986)
Franklin v McCaughtry
398 F3d 955
(7th Cir 2005)

   c. Judge's "own word" that Judge can be impartial is not sufficient, and Judge must recuse, if only reasonable inference from judge's extrajudicial conduct is actual bias

B. Judge's duties

1) Recusal required if any grounds in **Sec. 3.A.** above exist

757.19(4)

2) Judge must recuse self immediately when learns of disqualifying facts

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

   a. Def must raise disqualifying facts as soon as alleged infirmity known

St v Walberg
109 Wis. 2d 96,
109 (1982)

3) Failure of Judge to recuse self subject to harmless-error rule

757.19(6)

C. Sanctions for failure to recuse self

1) All legal remedies available in specific statutes

2) Referral to Judicial Commission of Wis Supreme Ct

757.19(3)

D. Waiver of sua sponte recusal allowed, provided

1) All parties and Judge agree, and

2) Full and complete record of facts creating disqualification made

4. Recusal for Prejudice

A. Def may seek removal of Judge by motion to recuse for actual prejudice

Sprang v St
63 Wis. 2d 679 (1974)

1) Def must demonstrate actual prejudice in fact on part of Judge

St v Bell
62 Wis. 2d 534, 536 (1974)

2) Def has no right to hearing on date of trial, when

a. Def avers no facts of actual prejudice by Judge, only conclusory allegations, and

b. Def's right to substitution under § 971.20 has passed

B. Constitutional right to impartial and unbiased Judge

St v Pinno
2014 WI 74
356 Wis. 2d 106
St v Gudgeon
2006 WI App 143
295 Wis. 2d 189

1) Due process requires that no person be tried by Judge prejudiced against that person

a. Subjective test—Judge's own determination of impartiality and

St v Gudgeon
2006 WI App 143
¶¶ 25–26,
295 Wis. 2d 189
St v Santana
220 Wis. 2d 674
(Ct. App. 1998)

b. Objective test—whether impartiality can reasonably be questioned

Dressler v Racine Cty Cir Ct
163 Wis. 2d 622, 644
(Ct. App. 1991)
see also St v Rodriguez
2006 WI App 163, ¶ 36,
295 Wis. 2d 801
remanded on other grounds (Wis 4/17/07)

2) "[N]ot all comments made by a judge during the course of the proceedings are grounds for disqualification. A trial judge may express his or her opinion about counsel's motions without being subject to recusal"

St v O'Neill
2003 WI App 73, ¶ 19,
261 Wis. 2d 534

3) Judge's prior adverse rulings or expressions of Judge's views of the law are not sufficient to demonstrate "personal" bias that requires recusal

St v McBride
187 Wis. 2d 409, 416–17
(Ct. App. 1994)

4) Party's support of Judge's opponent in previous election does not create personal bias, nor does mere fact that party filed disciplinary complaint against Judge, which did not result in discipline or public scrutiny, establish actual bias

St v Marcotte
2020 WI App 28, ¶¶ 39, 42, 392 Wis. 2d 183

5) Judge's presiding over both Def's treatment Ct proceedings and Def's sentencing after termination from program raises significant concerns regarding partiality

   a. Best practice is for different Judge to preside over Def's sentencing after termination

   b. If same Judge proceeds, comprehensive waiver should be used

CR 15: CHALLENGES TO SUFFICIENCY OF COMPLAINT/DOUBLE JEOPARDY

1. Timeliness of Motion Challenging Complaint........................ CR 15-1
2. Standards for Review of Sufficiency of Complaint................ CR 15-1
3. Specific Challenges to Complaint .... CR 15-4
4. Motion to Dismiss Based on Critical Misstatements or Omissions in Complaint.. CR 15-11
5. Double Jeopardy .... CR 15-11

1. Timeliness of Motion Challenging Complaint

§ 971.31(5)(a)

A. Misdemeanor: Must be made within 10 days after initial appearance

§ 971.31(5)(c)

B. Felony: Must be made before preliminary examination

St v Koller
2001 WI App 253
248 Wis. 2d 259

C. Objection deemed waived if not timely made

2. Standards for Review of Sufficiency of Complaint

St v Bonds
161 Wis. 2d 605
(Ct. App.)
rev'd on other grounds
165 Wis. 2d 27 (1991)

A. Complaint that alleges no crime is void and gives Ct no jurisdiction

St v Archambeau
187 Wis. 2d 502
(Ct. App. 1994)

1) This jurisdictional defect not cured by guilty plea

St v Diehl
205 Wis. 2d 1
(Ct. App. 1996)

2) BUT when Def pleads guilty to deficient charge (missing element) pursuant to oral amendment and plea bargain, no jurisdictional defect

St v Hurley
2015 WI 35, ¶ 37
361 Wis. 2d 529
St ex rel Evanow v Seraphim
40 Wis. 2d 223 (1968)

B. Complaint, within its 4 corners, must answer 5 "W's"

1) What is the charge?

2) Who is charged?

3) When and where?

4) Why is this particular person being charged?

5) Who says so and why should that person be believed?

§ 968.01, § 970.02(1)(a)

C. Complaint must contain "essential facts" constituting offense charged and possible penalty that may be imposed upon conviction

St v Moats
156 Wis. 2d 74 (1990)

1) Complaint may contain unconstitutionally obtained evidence to support probable cause

St v Blalock
150 Wis. 2d 688
(Ct. App. 1989)

D. Complaint must be minimally adequate based on common sense, not hypertechnical evaluation of essential facts establishing probable cause

St ex rel Cornellier v Black
144 Wis. 2d 745
(Ct. App. 1988)

1) A practical, commonsense measure of plausibility of particular conclusions about human behavior

2) Conclusions or inferences drawn need only be sufficiently more than mere possibility

a. So that reasonable people would appropriately act on them in pragmatic affairs of everyday life

St v Ritchie
2000 WI App 136
237 Wis. 2d 664

3) Circumstantial evidence may form basis for complaint

St v Hurley
2015 WI 35, ¶ 26
361 Wis. 2d 529
St v Kempainen
2015 WI 32, ¶ 16
361 Wis. 2d 450

E. Complaint must contain sufficient information, reliably reported, together with reasonable inferences, that cause Ct to form reasonable belief that Def probably committed crime charged

St v Manthey
169 Wis. 2d 673, 688–89
(Ct. App. 1992)
St ex rel McCaffrey v Shanks
124 Wis. 2d 216
(Ct. App. 1985)

F. If reasonable inference may be drawn establishing probable cause and equally reasonable inference to contrary, complaint sufficient

St ex rel Cullen v Ceci
45 Wis. 2d 432 (1970)

G. Fair-minded magistrate must conclude that facts and circumstances alleged justify further proceedings and charges not merely capricious

St v Elverman
2015 WI App 91, ¶ 18
366 Wis. 2d 169

H. Def must be able to determine

St v Chambers
173 Wis. 2d 237, 251
(Ct. App. 1992)

1) Whether complaint states offense to which Def able to plead and prepare defense, and

St v Kempainen
2015 WI 32, ¶ 17
361 Wis. 2d 450

2) Whether conviction or acquittal is bar to another prosecution for same charge

I. Reliability of information reported in complaint

§ 968.01

1) Information reported in complaint may be based on

   a. Personal knowledge of complainant, or

   b. Hearsay information given by complainant, or

   c. Combination of both

Illinois v Gates
103 S. Ct. 2317 (1983)
St v Ritchie
2000 WI App 136
237 Wis. 2d 664
St v Wolske
143 Wis. 2d 175
(Ct. App. 1988)

2) Reliability of hearsay information must be shown under totality of circumstances

Illinois v Gates
103 S. Ct. 2317 (1983)

   a. Judge must make balanced assessment of relative weights of all indicia of reliability (and unreliability) attending informant's tip

Illinois v Gates
103 S. Ct. 2317 (1983)
Jones v US
80 S. Ct. 725 (1960)

   b. Standard of review for probable cause determinations is whether Judge had "substantial basis" for determination

   c. "Totality of circumstances" test supersedes the "two-pronged test" under *Aguilar v Texas*, 84 S. Ct. 1509 (1964)

3) Specific types of informants

St v Paszek
50 Wis. 2d 619 (1971)

   a. Unnamed, compensated police informants

      - Reliability depends on record of past dealings and degree to which information proved reliable and trustworthy

Ruff v St
65 Wis. 2d 713 (1974)

b. Statements against penal interest

- Admitting own involvement deemed reliable unless it appears informant essentially attempting to exculpate self

St ex rel Warrender v Kenosha Cty Ct
67 Wis. 2d 333 (1975)

c. Law enforcement officer

- Deemed reliable and credible

St v Smaxwell
2000 WI App 112
235 Wis. 2d 230

- Non-eyewitness complainant can swear to reliability of unsworn eyewitness statement

St v Paszek
50 Wis. 2d 619 (1971)

d. Citizen informant

- Victim or witness to crime who aids law enforcement without expectation of gain or concession deemed reliable

Gelhaar v St
58 Wis. 2d 547 (1973)

4) Statements of accused

a. May be used in complaint for probable cause, even though inadmissible in evidence at trial because of *Miranda* violations

St v Clark
162 Wis. 2d 406
(Ct. App. 1991)

J. Ct has no inherent power to dismiss legally sufficient complaint absent statutory authorization, prosecutorial request, or constitutional violation

State v Rippentrop
2023 WI App 15
406 Wis. 2d 692
pet for rev denied

1) Ct has authority to order specific performance of nonprosecution agreement and dismiss complaint with prejudice

St ex rel Unnamed Petn'r v Cir Ct
157 Wis. 2d 157
(Ct. App. 1990)

K. Ct cannot substitute its judgment for that of DA as to appropriateness of charge

3. Specific Challenges to Complaint

A. Sufficiency of alleged time of offense

1) Criminal charge must be sufficiently stated to

St v Kempainen
2015 WI 32, ¶ 17
361 Wis. 2d 450

St v Kaufman
188 Wis. 2d 485
(Ct. App. 1994)

a. Allow Def to plead and prepare defense, and

   - To charge a continuing violation, complaint must allege date when violation began

b. Bar second prosecution for same offense

St v Hurley
2015 WI 35, ¶ 34
361 Wis. 2d 529
St v Kempainen
2015 WI 32, ¶ 22
361 Wis. 2d 450

2) In sexual assault cases, time allegation need not be precise

St v Kempainen
2015 WI 32, ¶ 24
361 Wis. 2d 450
St v Fawcett
145 Wis. 2d 244
(Ct. App. 1988)

3) Factors in determining sufficiency of time allegation

   a. Age and intelligence of victim and other witnesses

   b. Surrounding circumstances

   c. Nature of offense, including likelihood of its occurring at specific time or likelihood of being discovered immediately

   d. Length of alleged period of time in relation to number of individual criminal acts alleged

   e. Passage of time between alleged period of crime and Def's arrest

   f. Duration between indictment and alleged offense

   g. Ability of victim or complaining witness to state date and time of alleged offense with particularity

St v Kempainen
2015 WI 32, ¶ 28
361 Wis. 2d 450

   h. Any other relevant factors

St v Stark
162 Wis. 2d 537
(Ct. App. 1991)

4) State has ethical duty to disclose information regarding time of alleged commission of offense

St v Scott
2017 WI App 40, ¶ 18
376 Wis. 2d 430

5) Ct applies statute in effect at the time of the last criminal action constituting a continuing offense